Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

DONALD S. EKLUND,

Petitioner,

v.

WHEATLAND COUNTY, AND ITS SHERIFF,
JAMES ROSENBERG,

Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

Thomas E. Towe
Counsel of Record
For Petitioner
2525 6th Avenue North
PO Box 30457
Billings, MT 59107
(406) 248-7337

QUESTIONS PRESENTED

Whether the Plaintiff was denied due process of law when he was forced to accept a jury in his personal injury law suit all of whom were taxpayers of the Defendant county and who feared they personally would be required to participate in the payment of a very large verdict against the county. Due process is denied if either the Judge or the Jury have a significant financial interest in the outcome. *Aetna Life Insurance Company v. LaVoie*, 475 US 813, 824 (1986). Here the average juror's share was $1,241.63 and the jury foreman's share was $7,334.42 out of his own pocket.

PARTIES

The Petition is Donald S. Eklund.

The Respondents are Wheatland County and its Sheriff, James Rosenberg.

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§3-15-302(2), Montana Code Annotated ("MCA")

> (2) On the trial on an action in which the county is interested, the inhabitants of such county are com-

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petent jurors if otherwise competent and qualified according to law.
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§25-2-201, MCA.
The court or judge must, on motion, change the place of trial in the following cases:
(1) When the county designated in the complaint is not the proper county; (2) when there is reason to believe that an impartial trial cannot be had therein; (3) when the convenience of witness and the ends of justice would be promoted by the change.
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§25-2-126(2), MCA.
(2) The proper place of trial for an action against a political subdivision is in the county in which the claim arose or in any county where the political subdivision is located.
..... 3

§25-7-223(5), MCA.
Challenges for cause maybe taken on one or more of the following grounds:

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> . . . (5) Interest on the part of the juror in the event of the action or in the main question involved in the action, accept the juror's interest as a member or citizen of a municipal corporation;
>
> . . .

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Section 1, 14th Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

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person within its jurisdiction the equal protection of the laws.

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Evidence that a person was or was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court issue a Writ of Certiorari to review the opinion of the Montana Supreme Court entered on July 9, 2009.

OPINION BELOW

The Montana Supreme Court filed its Opinion on July 9, 2009. It is reported at 351 Mont. 370, 212 P.3d 297, 2009 MT 231 (No. DA 08-0329). The same case was previously decided with an Opinion of the Montana Supreme Court dated December 14, 2006 and can be found at 335 Mont. 112, 151 P.3d 870, 2006 MT 333 (No. 04-780).

JURISDICTION

The Montana Supreme Court filed its decision on July 9, 2009. This Court has jurisdiction under 28 U.S.C. §1257(a) to review the decision of the highest Court of a state in which the validity of a statute of any state is drawn into question on the ground of its being repugnant to the Constitution of the United States.

STATEMENT OF NOTIFICATION

Under Rule 29.4(c) 28 U.S.C. §2403(b) may apply and the Attorney General of the State of Montana shall be served with a copy of this Petition. The Attorney General of Montana was notified, pursuant to Rule 27 of the Montana Supreme Court

Rules on July 18, 2008, that Plaintiff intended to challenge the constitutionality of four statutes. On August 21, 2008, the Attorney General served notice of his intent not to intervene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1, 14th Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. §3-15-302(2), Montana Code Annotated ("MCA")

> (2) On the trial on an action in which the county is interested, the inhabitants of such county are competent jurors if otherwise competent

and qualified according to law.

3. §25-7-223(5), MCA.

Challenges for cause maybe taken on one or more of the following grounds:

. . . (5) Interest on the part of the juror in the event of the action or in the main question involved in the action, accept the juror's interest as a member or citizen of a municipal corporation;

. . .

4. §25-2-126(2), MCA.

(2) The proper place of trial for an action against a political subdivision is in the county in which the claim arose or in any county where the political subdivision is located.

5. §25-2-201, MCA.

The court or judge must, on motion, change the place of trial in the following cases:

(1) When the county designated in the complaint is not the proper county; (2) when there is reason to believe that an impartial trial cannot be had therein; (3) when the convenience of witness and the ends of justice would be promoted by the change.

6. **Rule 411, MONTANA RULES OF EVIDENCE, LIABILITY INSURANCE**

> **Evidence that a person was or was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.**

WHEN THE FEDERAL QUESTION WAS RAISED.

Upon remand of the case for trial against the Defendant Wheatland County, Plaintiff immediately moved for a change of venue contending that an impartial jury could not be obtained in Wheatland County and that, in view of the amount of Plaintiff's claim, there is no way a taxpayer can be an impartial or unbiased juror in this small county and it would be fundamentally unfair to let such a juror serve on Plaintiff's case. See Plaintiff's Motion for Change in Venue and Brief in Support dated January 8, 2007, App.30-42. In addition, Plaintiff raised the same question in discussing with the Judge in chambers what questions counsel could ask on voir dire, in the Settlement of Instructions which resulted in the rejection of Plaintiff's proposed Instructions, and in chambers on what counsel

would be permitted to say in final closing argument. It was the first issue raised by Plaintiff on appeal to the Supreme Court of the State of Montana.

PROCEDURAL AND FACTUAL BACKGROUND

The Nature of the Case.

Donald S. Eklund was severely injured as he was getting out of his pickup and walking into the barbershop in Harlowton, Montana. R.T., a 13-year-old juvenile who had just escaped from the Yellowstone County Youth Services Center in Billings and stolen his grandfather's pickup was driving at a high rate of speed when he was met by the Wheatland County Undersheriff, Les Christianson just East of Harlowton. Les Christianson turned around and proceeded to chase him into town resulting in a high speed chase through the center of Harlowton, The Trost vehicle slammed into Eklund's vehicle and several others causing Eklund's injuries.

Eklund filed suit against R.T. (the driver of the runaway vehicle), Lynn Hamilton (his mother), Carl Moody, (his grandfather and the owner of the vehicle), Wheatland County and its sheriff (responsible for the hot pursuit through town), Yellowstone County (who let R.T. and his buddy escape), and Donna Marman, the juvenile probation officer in charge of R.T. (who failed to timely notify the local law enforcement officials) and her

employers, Golden Valley, Wheatland County, Meagher County, and Musselshell County.

The Sheriff's Hot Pursuit

At 9:59 a.m., the Wheatland County Sheriff's dispatcher received a report from Musselshell County that there was a stolen 1995 pickup truck headed towards Harlowton. The report included a full description of the vehicle including the license plate number. It identified the possible driver and his companion both of whom had run away from the Yellowstone Youth Service Center in Billings. The Report stated that R.T. maybe headed towards his parents cabin or D.D.'s home, both of which were on the other side of Harlowton.

At 10:05 a.m., the Wheatland County Sheriff dispatcher called all units advising them of an attempt to locate the vehicle stolen in Roundup. The dispatcher received and advised all units twice more of the vehicle's progress towards Harlowton.

Deputy Sheriff Les Christianson heard the initial bulletin but chose to go to a neighboring town on an errand accompanied by an off-duty highway patrol officer, James Rosenberg, (who later was elected Sheriff and substituted as the party Defendant). After the second dispatch they headed in the direction of the on coming vehicle. At 11:11 a.m., Deputy Sheriff Christianson radioed in the report that the suspect vehicle just went by him 3½ miles east of Harlowton heading West. Christianson

immediately turned around and, with his siren and flashing red light turned on, began pursuing the R.T. vehicle. Christianson acknowledged he was going approximately 80 miles an hour.

Another deputy, Officer Craig Clements saw the R.T. vehicle coming at him at a high rate speed. With his overhead lights flashing, Clements crossed over the centerline, "kinda swerving at him" in a feeble effort to make the pickup stop. Clements also had his lights and siren going. When he could see that R.T. was not going to stop, he immediately made a U-turn and proceeded to follow them. Officer Clements commented that the pickup was doing about 100 miles per hour as it came around the corner (into downtown Harlowton). Christianson was right there maybe 100 yards or so behind.

Christianson was unable to catch up with the R.T. vehicle until he was almost into town. After going past the city limits sign at the approximate location of the 45 mph sign, Christianson noticed that he was traveling somewhere between 75 and 80 mph. He also noted that the suspects were not slowing down or pulling over. In his statement to the Department of Justice Criminal Investigator, on the day of the accident, Christianson stated that when he looked down at is speedometer and realized he was going 75 mph into town, "I thought, you know, this is way too fast and there's to many people." In his own Incident Report, Christianson stated "I realized that we were going way too fast in town and that someone was going to get hurt." Rosenberg,

who was riding with Christianson, confirmed that when he looked at the speedometer as they were crossing the bridge (well into town, near where the speed limit dropped from 35mph to 25mph) they were going between 70 and 75 mph, probably closer to 75. At this point, Rosenberg told Christianson "This isn't good."

At about this time, they were between 60 and 70 yards behind the suspect vehicle and Christianson took his foot off the gas. There is no evidence that Christianson attempted to slow down in any other way than taking his foot of the gas. Christianson confirms that he let off the gas one block after the 35 mph sign, near the 25 mph sign which is right near a school on one side of the road and a swimming pool and ballpark on the other. He did admit that he put his foot back on the gas to maintain his speed.

R.T. then attempted to pass another car in front of him which was in the process of making a left turn. He clipped the front end of this car, lost control of the pickup truck he was driving and ultimately struck Donald Eklund in the parking lot as Donald Eklund was getting out of his vehicle to go into the barbershop to get a haircut for his daughter's wedding. The force of the collision was so severe that it pushed two of the parked vehicles through the parking lot and across the street where they came to rest on the westside of Central Avenue. There were a total of five vehicles in the accident including one on the other side of Central Avenue.

It is something of a miracle that Eklund survived because of the huge amount of force with which the speeding vehicle hit Eklund's pickup. Somehow he was thrown into the air and when he came down he landed on the hard pavement in the parking lot after both vehicles had gone underneath him. As Rosenberg stated "when he was hit by the vehicle, I believe I told Les I thought he was dead."

Overwhelming Evidence of Negligence

At trial, Plaintiff produced an extremely well-qualified expert witness on hot pursuits, Richard Dague. Dague, with many years of experience as an officer, an Assistant Chief of Police, a trainer, and a chief instructor for the law enforcement academy in Oregon, teaches and develops programs for master instructors and master instructor courses around the nation. His credentials and list of experience is truly most impressive.

Dague concluded that the sheriff's officers did almost everything wrong. He criticized Undersheriff Christianson for a lack of communication, for failure to plan their next steps, and to execute these steps according to the plan. He indicated there was no preparation even though they had plenty of time to do so. Further, the sheriff officers failed to follow their own training by preventing injury to subjects, people and property. They definitely did not follow their own written policies for hot pursuit. They did not follow their policy on communication. They did not follow their policy on roadblocks. They did not

follow their policy on avoiding risk to other persons and property. He stated they should have backed off and slowed down (not just let up on the gas) when they realized they were going too fast, something they were trained to do. Undersheriff Christianson followed too close - 4-6 car lengths. He says this happens when people "get caught up in their adrenalin and they get to close." Once they had identified the suspects, they should have let them go through the city without incident and either continued the chase on the other side of town or wait until they got to their ultimate destination, a matter that was already known to them.

Richard Dague concluded by stating that there is increased concern in the law enforcement community over hot pursuits. He explained that between 25% and 50% of all law enforcement officers killed in the line of duty involve vehicles, often during hot pursuits.

The evidence of negligence was overwhelming. The facts are generally not in dispute and there was no refutation of Dague's conclusions. Truly impartial jurors certainly would have concluded the Defendant was negligent.

Plaintiff's Injuries and Damages

Eklund's injuries were serious. He was taken by ambulance to the Emergency Room of the Wheatland Memorial Hospital and quickly flown to Billings. He nearly died on the flight to Billings.

Eklund lost his spleen, his pancreas was torn loose, he suffered a collapsed lung, and he suffered numerous serious puncture wounds, including a hole in his shoulder, lacerations, and abrasions. He was in the hospital for 11 days during which he was operated on several times. At the time of his trial, the medical bills totaled $97,923.42. Eklund suffers some permanent damage. His total special damages based on the evidence presented at trial amounted to $579,879.02. These are not exaggerated or over stated as was clearly apparent to the Defendant and jurors alike. If the jury had found the Defendant Wheatland County negligent, it would have been hard pressed to reduce Plaintiff's claim below the $1,375,000.00 that he claimed.

Procedural Disposition

R.T. had a small trust fund of approximately $19,000.00 and Eklund settled with R.T. and his mother, Lynn Hamilton for $20,500.00. The District Court granted summary judgment in favor of Carl Moody, the grandfather, and in favor of Wheatland County and its sheriff for the hot pursuit. A new Judge then granted summary judgment in favor of Donna Marman, the juvenile probation officer. The case then went to trial before a jury in Wheatland County only against Yellowstone County for allowing R.T. to escape.

Following a defense verdict Eklund appealed and asked the Supreme Court to reinstate the case against Wheatland County for hot pursuit. In

Eklund v. Trost, 335 Mont. 112, 151 P.3d 870 (2006), the Montana Supreme Court reversed as to Wheatland County and its sheriff on the hot pursuit issue but affirmed as to the other Defendants. The only remaining Defendant then was Wheatland County and its sheriff, James Rosenberg.

Eklund then moved for a change in venue pointing out that he was seeking damages in excess of $1,375,000.00 from a jury all of whom will be taxpayers of the county that will have to pay the Judgment. His Motion for Change of Venue was denied and all efforts to inform the jury that the taxpayers would not be responsible for the amount of the Judgment because the County was insured were rejected.

A second trial was then held against Wheatland County in Wheatland County before a jury all of whom were taxpayers of Wheatland County. The jury found for Wheatland County on the issue of liability.

Eklund appealed again to the Montana Supreme Court asserting that he was denied his rights under the due process clauses of the Montana and Federal Constitutions because (1) the District Court failed to grant his Motion for Change of Venue; (2) the District Court refused to let the jury consider the source of payment of any verdict; (3) the District Court refused to grant his request to dismiss a prospective juror who acknowledged having some "ingrained prejudices" that "may taint" a decision or

judgment in favor of Plaintiff because he did not know how the judgment would be paid, and (4) that the trial court committed error in refusing to grant Plaintiff's Motion for Judgment on Liability Notwithstanding Verdict or, in the alternative, for a New Trial. The Supreme Court affirmed in a four to one decision on July 9, 2009. (See App.1-19.)

The Jurors

Because property taxes are matters of public record, it is a simple matter to determine the taxable value of each jurors' property.[1] Using the applicable mill levy, the exact amount of the taxes that each taxpayer would pay if Wheatland County had to pay the entire amount of Plaintiff's claim, namely, $1,375,000.00, is relatively easy to calculate. The list of each juror and each juror's share of the Plaintiff's claim amount is listed below:

Jurors	Portion of taxes owed if, $1,375,000 was awarded
Bacon	$ 200.91
Brook	$ 333.34
Borbe	$4,769.15
Frost	$ 80.65
Keller	$ 63.83
Lammers (the foreman)	$7,334.42
Miller	$ 144.77

[1]Every single one of the jury were taxpayers of the Defendant, Wheatland County. Some, such as the foreman, were taxpayers through a farm entity and one was a taxpayer through her spouse.

Moore	$1,151.48
Schuchard	$ 167.21
Sedgewick	$ 348.67
Senior	$ 168.70
Todhunter	$ 136.41

Because of the enormous amount of damages suffered by the Plaintiff, his claim of $1,375,000 was a very solid number. Thus, if the jury found for the Plaintiff and awarded the amount claimed, the average juror would pay $1,241.63 as his or her share of the jury verdict. The foreman was by far the largest taxpayer. His share of Plaintiff's claim would amount to $7,334.42. Erica Borbe's share amounts to $4,769.15. These sums are not de minimus. In a small county, it must be assumed the taxpayers would have a general idea of how much they would have to contribute to pay that County's expenses. These numbers clearly would offer a possible temptation to the average person to forget the burden of proof required to find for the Plaintiff and might lead the average person not to hold the balance nice, clear and true between the parties.

REASONS FOR GRANTING THE PETITION

I.

Forcing the Plaintiff to Accept 12 Jurors, Each of Whom Have a Personal Financial Stake in the Outcome of His Case, Has Denied Plaintiff Due Process of Law as

Guaranteed by the Fourteenth Amendment.

The Montana Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court. In addition, it has decided and important federal question in a way that conflicts with the relevant decisions of this Court. That decision is the well-settled law that the person or persons sitting in judgment of a litigant's case must not have a direct financial or personal interest in its outcome.

Is There a Possible Temptation?

As stated by Justice Black in *In re: Murchison*, 349 US 133, 136 (1955) under the due process clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *Accord, Aetna Life Insurance Co. v. LaVoie*, 475 US 813, 822 (1986). This Court has framed the test as follows:

> Whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"

Aetna, 475 US at 822, quoting with approval from *Ward v. Village of Monroeville*, 409 US 57, 60 (1972).

The Law is Well Settled as it Relates to Judges

In *Aetna, supra*, an Appellate Judge ruling on a case of insurance company bad faith had a direct personal, substantial, pecuniary interest when he had a similar insurance company bad faith case himself that would clearly be affected by his decision. *Aetna*, 475 US at 822

As stated by this Court in *Tumey v. Ohio*, 273 US 510, 523 (1927):

> It certainly violates the 14th Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

273 US at 523. In that case this Court concluded a system by which an inferior judge (the village mayor) is paid for his services only when he convicts the Defendant is in violation of the due process clause of the 14th Amendment.

Further, this Court held that a mere $12.00 in costs from the appellant, which amounted in the aggregate to about $100.00 a month, is not de minimus. *Tumey v. Ohio*, 273 US at 531-32,

> It is certainly not fair to each Defendant brought before the mayor for the careful

> and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal.

273 US at 532. Furthermore, it was not just his personal pecuniary interest but his interest as mayor in the financial condition of the village that was involved. (*Id.* at 533.)

In *Ward v. Village of Monroeville*, 409 US 58-60 (1972), a major part of the village income was derived from fines, forfeitures, costs, and fees imposed by the mayor in the mayor's court. Citing *Tumey v. Ohio*, this Court said:

> The test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the Defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.

409 US at 60. In *Ward*, the mayor's executive responsibility for the village finances was sufficient to deprive the petitioner of a neutral and detached judge in the first instance. (*Id.* at 60, 62.)

Finally, *In re: Murchison*, 49 US 133, 136 (1955), a one man judge-grand jury not only indicted both defendants but then later tried both defendants in open court for criminal contempt and perjury. In

holding that the one man grand jury could not then sit as trial judge, this court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has also endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

Id. See also, *Bracy v. Gramley*, 520 US 899. ("A judge who accepts bribes from a criminal defendant to fix that defendant's case is "biased" in the most basic sense of that word") and *Caperton v. AT Massey Coal Company, Inc.*, 129 S. Ct. 2252, 2259 (June 8, 2009)(the due process clause does not require proof of actual bias but only a serious risk of actual bias).

In *Caperton,* Caperton obtained a $50 million dollar compensatory and punitive damage award against a coal company for fraudulent misrepresentation, concealment, and tortuous interference with existing contractual relations. The President of A.T. Massey Coal Co. realized an appealed to the Supreme Court was imminent and supported an attorney by the name of Benjamin who was challenging an incumbent, Justice McGraw, for election. The President of Massey spent over $3 million dollars in trying to get Benjamin elected and

succeeded. Benjamin then refused to recuse himself from the A.T. Massey Coal Co.'s case came before the Court on appeal. Benjamin joined in a majority opinion reversing the $50 million dollar verdict. This court stated:

> The due process clause has been implemented by objective standards that do not require proof of actual bias.

129 S. Ct. at 2263. Citing *Withrow v. Larkin*, 421 US 35, 47 (1975), this court stated:

> "under a realistic appraisal of psychological tendencies and human weaknesses," the interest "possess such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Id. Finally,

> We conclude that there is a serious risk of actual bias - based on objective and reasonable perceptions - when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the

> contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amounts spent in the election, and the apparent effect such contribution had on the outcome of the election.

Id.

The Same Logic and Reasoning should Apply to Jurors

There is no reason why this same logic and reasoning should not be applied with equal vigor to jurors as well as the presiding judge or participating justice. The juror is at least, if not more, involved in deciding a litigants case. Jurors sit in judgment of the litigant's facts.

A jury is as much a part of "fair tribunal" as is the judge. *In re: Murchison*, 349 US 133, 136 (1955)("a fair trial in a fair tribunal is a basic requirement of due process"); *Turner v. Louisiana*, 179 US 466, 472 (1965).

Justice Thurgood Marshall spoke of the right of a trial by an impartial jury as lying "at the heart of due process." *Porter v. Illinois*, 479 US 898 (1986)(Marshal dissenting). Chief Justice Waite quotes Lord Coke on the meaning of "impartial" and the importance of being indifferent. Chief Justice Waite concludes that raising a manifest presumption of partiality is sufficient to invoke due process clause

when a juror is involved. *Reynolds v. United States*, 98 US 145, 154-56 (1878).

In *Irvin v. Dowd*, 366 US 717, 721, this Court refers to the concepts of liberty and dignity and worth of every man that comes from English jurisprudence.

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.

Id. Further:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.

366 US at 722. This Court then states that impartiality is not a technical concept but it is a state of mind. In that case, the Court found the barrage of publicity surrounding the accused arrest affected not only his home county but the adjoining county and required a change of venue to protect his due process rights. 366 US at 725-26.

In *Turner v. Louisiana*, 379 US 466, 472 (1965) this Court quotes from its decision in *In re: Murchison, supra*, "a fair trial in a fair tribunal is a basic requirement of due process. *Id.* It then states:

> The jury is an essential instrumentality - an appendage - of the court, the body ordained to pass upon guilt or innocence.

Id. In that case, evidence that the jury fraternized with two of the leading prosecution witnesses during the trial was sufficient to deny the defendant due process of law. Further, it did not matter that both witnesses denied ever talking to the jurors about the case.

> [I]t would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial... .

379 US at 473.

Finally, see the extensive opinions of this Court in *Morgan v. Illinois*, 504 US 719, 727 (1992), regarding voir dire questions about the death penalty. As it relates to criminal cases, this Court's mandate is clear - due process demands that a jury must stand impartial and indifferent. 504 US at 719, 727.

Jurors in Civil Trials

There is no reason why the same logic and reasoning should not apply with equal force to juries in civil trials. As stated by this Court, in *Thiel v. Southern Pac. Co.*, 328 US 217, 219 (1946).

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.

Id. *Accord, J.E.B. v. Alabama ex rel. T. B.*, 511 US 127, 146, FN 19 (1994), (the equal protection clause prohibits discrimination in jury selection). In *Edmonson v. Leesville Concrete Company, Inc.*, 500 US 614, 630 (1991), this Court stated:

> A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial fact finders.

Id.

Here There Clearly is a Temptation

With evidence that the jurors in Plaintiff's personal injury case were subject to a possible personal tax assessment to Plaintiff's claim of between $63.83 and $7,334.42 (average of $1,241.63), these jurors were manifestly presumed

partial. The average person could not possibly avoid the temptation to rule against the Plaintiff to protect their own pocketbook. Indeed Arville Lammers, the jury foreman, would certainly be concerned about having to contribute $7,334.42 to Plaintiff's judgment. Erica Borbe would be more than a little concerned if she realized she would have to pay $4,769.15 to satisfy Plaintiff's judgment. This is more than a temptation.

To require Plaintiff to accept these jurors is a manifest violation of his due process rights. There is no way he can get a fair trial before an impartial and indifferent jury as is guaranteed to him under the due process clause of the 14th Amendment if the jurors genuinely fear they will be called upon to pay an average of $1,241.63 to satisfy Plaintiff's judgment. Far more than the mere appearance of justice is involved here. This is a serious and substantial direct, personal, and pecuniary interest in the outcome of the case. *Ward,* 409 US at 60; *Tumey,* 273 US at 523, *Aetna,* 475 US at 826. This Court should not turn a blind eye to the obvious. The temptation is overwhelming and obvious. Plaintiff has been denied due process.

Plaintiff's Efforts to Correct the Situation

Plaintiff tried at every step to avoid this predicament. He immediately moved for a change of venue when it became obvious that Wheatland County was the only Defendant left. His motion was denied by the Trial Court citing §3-15-302(2), MCA.

App. 25-29,[Order p.4]. This Montana statute specifically authorizes the inhabitants of a county to be competent jurors even though they may have an interest in the litigation as a taxpayer. The Supreme Court, affirming that decision, specifically cites their prior decisions indicating that the mere fact a party is a taxpayer of the county or district, does not provide a reason for disqualification. (App. 5-8).

This decision by the highest Court of the State of Montana is wrong. To the extend that it is required by statute, the statute is unconstitutional as applied to Plaintiff in this case. While there maybe some cases that are de minimus, when a Plaintiff is faced with a jury, the foreman of which could be required to pay $7,334.42 and the average juror $1,241.63, it is no longer de minimus. It is unconstitutional and has deprived Plaintiff of his due process of law.

It cannot be remedied, as the Montana Supreme Court suggests, by asking each juror whether they can remain unbiased and impartial notwithstanding their interest as a taxpayer. It would be impossible for the average juror to avoid the temptation to rule against the Plaintiff if he or she was required to pay a portion of the judgment of this magnitude . *Aetna*, 475 US at 822.

Next, Plaintiff sought to allow the jury to consider the source of payment for any damages. The Defendant, Wheatland County, was insured by a

government insurance pool, which would have paid most, if not all, of the judgment. Plaintiff asked first to be allowed to mention insurance or the source of payment during voir dire. He was refused. Second, he asked permission to mention insurance and the source of payment during final argument. Again his request was refused. Then Plaintiff also asked for Instructions regarding the source of payment. Again he was refused.

In each case, the Trial Court's denial of Plaintiff's requests were upheld by the Supreme Court, App. 8-12. Justice Patricia Cotter, dissenting, fully appreciated the significance of these requests and would have reversed the case on this point. App. 16-22. While this may not have totally resolved Plaintiff's concern, it certainly would have helped. In any event, the impact of the state action is the same. The state action as upheld by the Montana Supreme Court has deprived Plaintiff of his due process of law.

The severity of the problem was amply illustrated when one of the prospective jurors, Mr. Butts, indicated on voir dire that an "ingrained prejudice" "may taint" his decision or judgment regarding the Plaintiff's claim if he did not know the source of payment for that judgment. App. 16. Notwithstanding Mr. Butts statement, the Trial Court refused to strike this juror for cause thus requiring Plaintiff use one of his peremptory challenges on this juror. The Supreme Court affirmed the District Court's decision. (App. 12-13.

Although see Justice Cotter's strong dissent on this point. (App. 16-21.)

Finally, after the verdict was received, the Plaintiff moved for judgment on liability notwithstanding the verdict or, in the alternative, for a new trial. This post-trial motion was denied and affirmed on appeal. (App. 13-14.) Plaintiff argued that his evidence of negligence was so strong and his evidence of the amount of damages were so fixed that the jury obviously used a verdict in favor of the defense on liability as the easiest way out. By denying liability, even though the evidence was overwhelming, they could avoid the problem of how much money they, themselves, would have to pay. In other words, it was easier to say no liability than to reduce the amount of claimed liability. This would explain why the jury disregarded with the overwhelming evidence of negligence on the part of the Defendant. Nevertheless, the Supreme Court rejected Plaintiff's argument. (App. 15-16.)

Conclusion

Whether by force of statute or the application of the statute by the decision of the Trial Court as affirmed by the Supreme Court, there nevertheless has been state action that has denied Plaintiff's due process of law. A state court of last resort has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

In addition, if the application of due process in determining the impartiality of judges has not yet been extended in exactly the same manner to a jury, the state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court.

Either way, the Petition for Certiorari should be granted.

DATED this 6th day of October, 2009.

Respectfully submitted,

Thomas E. Towe
Towe, Ball, Enright, Mackey
Sommerfeld, PLLP
2525 Sixth Avenue North
PO Box 30457
Billings, MT 59107-0457
406-248-7337
Counsel of Record for
Petitioner

Supreme Court, U.S.
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No._____

In the
Supreme Court of the United States

DONALD S. EKLUND,

Petitioner,

v.

WHEATLAND COUNTY, AND ITS SHERIFF,
JAMES ROSENBERG,

Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the State of Montana

APPENDIX FOR PETITION FOR A WRIT OF CERTIORARI

Thomas E. Towe
Counsel of Record
For Petitioner
2525 6th Avenue North
PO Box 30457
Billings, MT 59107
(406) 248-7337

APPENDIX

Donald S. Eklund, Plaintiff and Appellant, v. Wheatland County, and its Sheriff, James Rosenberg, Defendant and Appellees. In the Supreme Court of the State of Montana, Cause No. DA 08-0329, Opinion decided July 9, 2009. 1-22

Donald S. Eklund, Plaintiff v. Wheatland County and its Sheriff James Rosenberg, Defendants. In the Montana Fourteenth Judicial District, Wheatland County, Montana, Cause No. DV 01-13, Order Denying Motions for Judgment Notwithstanding Verdict and for New Trial 23-24

Donald S. Eklund, Plaintiff v. Wheatland County and its Sheriff, Steve Riveland, Defendants. In the Montana Fourteenth Judicial District, Wheatland County, Montana, Cause No. DV 01-13, Order Denying Plaintiff's Motion for Change of Venue. 25-29

Donald S. Eklund, Plaintiff v. Roy Trost, Lynn Hamilton, Custodian for Roy Trost; Carl Moody; Wheatland County and its Sheriff Steve Riveland; and Yellowstone County and its subordinate Yellowstone County Youth Service Center; Donna Marmon, Juvenile Probation Officer, and her employers, Golden Valley County, Wheatland County, Meagher County and Musselshell County, Defendants. In the Montana Fourteenth Judicial District Court, Wheatland County, Montana, Cause No. DV 01-13, Plaintiff's Motion for Change of Venue and Brief in Support 30-42

App. 1

DA 08-0329

IN THE SUPREME COURT OF THE STATE OF MONTANA

2009 MT 231

DONALD S. EKLUND,

Plaintiff and Appellant,

v.

WHEATLAND COUNTY, and its Sheriff, JAMES ROSENBERG,

Defendant and Appellees.

APPEAL FROM: District Court of the Fourteenth Judicial District In and For the County of Wheatland, Cause No. DV 01-13 Honorable Katherine M Irigoin, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Thomas E. Towe, Towe, Ball, Enright, Mackey & Sommerfeld, PLLP, Billings, Montana

For Appellees:

Norman H. Grosfield and Dee Ann G. Cooney, Grosfield Law Firm, Helena, Montana

Submitted on Briefs:
May 13, 2009

Decided: July 9, 2009

Filed:

Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 We reversed the summary judgment issued in favor of wheatland Count and its sheriff in *Eklund v. Trost*, 2006 MT 333, 335 Mont. 112, 151 P.3d 870, *(Eklund I)* and remanded the case to the District Court. The case proceeded to trial and from those proceedings Donald Eklund (Eklund) filed this timely appeal. We affirm.

¶2 Eklund raises the following issues on appeal:

¶3 Issue 1: Whether §3-15-302(2), MCA violates provisions of the Montana and United States Constitutions.

¶4 Issue 2: Whether the District Court erred when it denied Eklund's motion for change of venue.

¶5 Issue 3: Whether the District Court erred when it refused to allow the jury to consider the source of payment for any damages that might be awarded.

¶6 Issue 4: Whether the District Court erred when it refused to strike a prospective juror for cause.

¶7 Issue 5: Whether the District Court erred when it denied Eklund's motion for judgment notwithstanding the verdict, or motion for new trial.

¶8 We discussed at length the facts giving rise to the matter in *Eklund I*, specifically ¶¶6-19. We will repeat here only those facts pertinent to this appeal.

¶9 Eklund attempted to change the venue of the trial following our remand in *Eklund I*. He argued that the amount of damages that he sought would affect the potential jurors. He reasoned that the jurors most likely would be taxpayers in Wheatland County who would be saddled with the cost of any judgment against Wheatland County. Eklund feared that the juror's concerns of potentially higher taxes to pay the award would prejudice him. The District court denied Eklund's motion

¶10 Eklund raised the issue of who would be liable for judgment against Wheatland County during voir dire. Eklund attempted to have potential juror Wayne Butts (Butts) removed for cause. Butts owned a particularly large tract of land in the county. Butts expressed concerns from where the money for a potential verdict would come. Counsel for Wheatland County objected to the removal of Butts. The Court allowed the parties to question Butts further before denying Eklund's motion.

Eklund eventually removed Butts from the panel with a preemptory challenge.

¶11 Eklund attempted to inform the jurors of Wheatland County's pooling arrangements (insurance coverage) regarding the satisfaction of any verdict. The court did not allow Eklund to question the potential jurors directly about the source of the money available to cover any judgment against Wheatland County during voir dire, during the presentation of evidence, and through the issuing of jury instructions. The court also denied Eklund's attempts to present evidence of the pooling arrangements to the jurors.

¶12 The issue arose again during the settling of jury instructions. The court instructed the jury that they could not consider whether the county could afford to pay an award in determining damages. The court also instructed the jury not to consider whether an award would raise taxes and whether an award would serve as a windfall for Eklund.

¶13 The jury returned a verdict in favor of Wheatland County. Eklund moved for a judgment notwithstanding the verdict. Eklund asserted that he had presented overwhelming evidence to demonstrate the county's liability. Eklund also argued that this overwhelming evidence to demonstrate the county's liability. Eklund also argued that this overwhelming evidence, in conjunction with various alleged errors made by the trial court, required the court to grant the motion. Eklund moved in the alternative for a new trial. The court denied both requests. Eklund appeals.

STANDARDS OF REVIEW

¶14 We presume statutes to be constitutional and it is the duty of the Court to avoid any unconstitutional interpretation if possible. *Montanans for Responsible Use of School Trust v. State of Montana ex rel. Board of Land Commissioners*, 1999 MT 263, ¶11, 296 Mont. 402, 989 P.2d 800. A statute will be upheld on review except when proven to be unconstitutional beyond a reasonable doubt. *School Trust*, ¶11.

¶15 We review for an abuse of discretion a district court's ruling on a motion for change of venue. *State v. Pease*, 227 Mont. 424, 433, 740 P.2d 659, 664 (1987). We will not overturn a district court's ruling on admissibility of evidence absent a showing of abuse of discretion. *Christofferson v. City of Great Falls*, 2003 MT 189, ¶8, 316 Mont. 469, 74 P.3d 1021. The same abuse of discretion standard applies to jury instructions. *Edie v. Gray*, 2005 MT 224, ¶12, 328 Mont. 354, 121 P.3d 516. We likewise review for abuse of discretion a district court's denial of a challenge for cause of a potential juror. *Crail Creek Associates, LLC v. Olson*, 2008 MT 209, ¶13, 344 Mont. 321, 187 P.3d 667.

¶16 When reviewing a motion for judgment notwithstanding the verdict, we view all of the evidence in a light most favorable to the non-moving party. *Okland v. Wolf*, 258 Mont. 35, 38, 850 P.2d 302, 304 (1993). The court may grant the motion only if it appears that the non-moving party cannot recover upon any view of the evidence, including legitimate inferences to be drawn from it. *Oklund*,

258 Mont. At 38, 850 P.2d at 304. We determine whether substantial credible evidence supported the verdict when reviewing a district court's refusal to grant a new trial based upon alleged insufficiency of the evidence. *Payne v. Knutson*, 2004 MT 271, ¶25, 323 Mont. 165, 99 P.3d 200.

DISCUSSION

¶17 Issue 1: Does §3-15-302(2), MCA, violate provisions of the Montana and United States Constitution?

¶18 Eklund asserts that concern by jurors regarding the size of the potential verdict denied him a fair trial and violated due process. Section 3-15-302(2), MCA, provides that the inhabitants of the county may serve as jurors if otherwise competent and qualified according to the law when a county is an interested party in a trial. A person is competent to serve on a jury if they are 18 or older, a resident of the area for 30 days, and a United States citizen. Section 3-15-301, MCA.

¶19 We previously have addressed this residency issue and held that being a taxpayer of a county or district that is a party does not provide a reason for disqualification. *Carter County v. Cambrian Corp.*, 143 Mont. 193, 387 P.2d 904 (1963); *School District No. 1 v. Globe and Republic Ins. Co.* 142, Mont. 220, 383 P.2d 482 (1963). The potential jurors at issue in *Carter County* and *School District 1* had remote potential interests in the outcome of the case due to the possibility of increased taxes to cover a potential award against the governmental entity. We rejected

challenges in both cases that the jurors' status as taxpayers of the county of district could constitute grounds for disqualification.

¶20 Eklund provides little support other than his repeated concern that allowing jurors to serve who fear that they would be liable for satisfaction of the verdict is unconstitutional. Eklund cites no authority to support his claim that simply being a taxpayer constitutes a disqualifying interest. Eklund has failed to establish beyond a reasonable doubt that ¶3-15-302(2), MCA, violates his constitutional right to a fair trial and due process of law. *School Trust*, ¶11.

¶21 Issue 2: Did the District Court err when it denied Eklund's Motion for Change of Venue?

¶22 A judge must change the place of trial when there exists a reason to believed that an impartial trial cannot be held or when the convenience of witnesses and the ends of justice would be promised. Section 25-2-201(2)-(3), MCA. Eklund asserts that ample reason exists to believe that an impartial jury could not be achieved in Wheatland County. Eklund further assets that, as each juror was either a taxpayer or related to a taxpayer, each juror had an interest in the outcome.

¶23 A party seeking to overturn a denial of change of venue must show that a fair and impartial trial could not have been had. *School distr. No. I*, 142 Mont. at 223, 383 P.2d at 484. The legislature did not intend that simply being a taxpayer would

disqualify a person from sitting on the jury. *School Distr. No. 1*, 142 Mont. At 225, 383 P.2d at 485.

¶24 Counsel for Eklund and Wheatland County established during voir dire that the potential jurors were willing to return a verdict in favor of Eklund if the facts necessitated such a finding. The jurors also admitted they would be willing to return a large verdict if the evidence supported one. Nothing from voir dire leads us to believe that the jury would have been unwilling to deliver a verdict in Eklund's favor. Some jurors admittedly expressed concerns about the source of the verdict award, but none of the jurors stated that this concern would affect their impartiality.

¶25 Eklund cites multiple cases from other jurisdictions in support of his argument. We find these cases to be distinguishable from the issue at hand. For example Eklund cites *Wheeler v. Cobbs & Mitchell Col*, 253 P.5 (Ore. 1927), in which the court held that taxpayers are absolutely disqualified from serving on a jury when the county is a party. Eklund fails to inform that this rule of law no longer applies in Oregon as evident by the decision in *State ex rel. Douglas County v. Sanders*, 655 P.2d 175 (Ore. 1982). The court in *Douglas County* specifically held "that county residents are not disqualified from serving as jurors solely because the county has a pecuniary interest in the outcome." *Douglas County*, 655 P.2d at 175.

¶26 Eklund also relies on an old case from North Dakota. In *Sheridan County v. Davis*, 240 N.W. 867 (N.D. 1932), the North Dakota court determined that

the jury panel's status as taxpayers implied bias on the entire jury pool. The court reversed a denial of a motion for change of venue.. *Sheridan County*, 240 N. W. At 871. The court in *Linington v. McLean County*, 150 N.W.2d 239 (N.D. 1967), also refused to reverse a district court's decision to grant a motion for change of venue. The court cited that fact that "the trial court after weighing all of the allegations and the contentions" reached the conclusion the people of McLean County were sympathetic to McLean County and for this an other reasons granted a motion for change of venue.

¶27 Here we fact a situation where the District court denied a motion for a change of venue. We review this denial for an abuse of discretion. *Pease*, 227 Mont. At 433, 740 P.2d at 664. The District Court weighted all of the allegations and contentions before reaching the conclusion that the citizens of Wheatland County could be fair and impartial jurors. Nothing in record leads us to believe that the District Court abused its discretion in determining that the jury could be fair and impartial. We decline to imply bias based solely on the juror's status as taxpayers. The District Court did to abuse its discretion in denying a change of venue.

¶28 Issue 3: Did the District Court err when it refused to allow the jury to consider the source of payment for any damages that might be awarded?

¶29 Evidence of insurance generally may not be admitted upon the issue of whether a party acted negligently or otherwise wrongfully. Evidence of

insurance may be admitted, however, when offered to prove agency, ownership, control, bias or prejudice of a witness. M. R. Evid. 411. Eklund does to argue that evidence of insurance would have been offered to prove agency ownership, control, bias or prejudice. Eklund sought to offer evidence regarding Wheatland County's insurance coverage to alleviate the fears voiced by some jurors regarding what party would be responsible to pay an award.

¶30 A jury determining liability and fixing damages may not consider the method of satisfying a judgment. *Wollaston v. Burlington Northern, Inc.*, 188 Mont. 192, 206, 612 P.2d 1277, 1284 (1980). The plaintiff in *Wollaston* submitted a proposed jury instruction regarding insurance to eliminate the "jury-taxpayer" problem in an action in which Sanders County was a co-Defendant. *Wollaston*, 188 Mont. At 206, 612 P.2d at 1284. The district court had instructed the jury that they were "not to consider in what manner the Defendant Sanders County meets its obligation as a judgment if rendered." *Wollaston*, 188 Mont. At 206, 612 P.2d at 1284. The Court held the district court properly had instructed the jury on this matter and that further instruction about possible sources might have lead to speculation on issues not before the jury. *Wollaston*, 188 Mont. At 206, 612 P.2d at 1284.

¶31 Similar to *Wollaston*, the District Curt adopted Eklund's proposed instruction that the jury should not consider whether Wheatland County could afford any award or the source of any award. The court removed mention of "insurance" from the proposed

instruction in a manner similar to the instruction provided in *Wollaston*.

¶32 Eklund relies on *Goodnough v. State*, 199 Mont. 9, 647 P.2d 364 (1982), to support his argument that the court erred in not allowing him to mention insurance during voir dire. We held in *Goodnough* that it is appropriate for counsel to question potential jurors during voir dire about their beliefs as taxpayers and their concerns on the financial outcome of the case. *Goodnough*, 199 Mont. At 19, 647 P.2d at 369.

¶33 The District Court allowed Eklund's counsel to question the jury during voir dire in a manner similar to the type of questioning affirmed by this Court in *Goodnough*. Eklund had ample opportunity to question the potential jurors about whether their status as taxpayers would allow them to be fair and impartial. Eklund's counsel questioned the jurors about the possibility of having to issue a large award that would affect their ability to serve. Eklund's argument might carry more weight if the jury had issued a small award to Eklund in the face of evidence that established that Eklund had suffered severe injuries as a result of Wheatland County's negligence. The jury found no liability on the part of Wheatland County.

¶34 The Dissent chides our lack of citation to *Jenks v. Bertelsen*, 2004 MT 50, 320 Mont. 139, 86 P.3d 24. In *Jenks*, defense counsel repeatedly discussed the fact that the Plaintiff had contacted a lawyer shortly after the accident. *Jenks*, ¶14. The Plaintiff sought to introduce evidence of the fact that she has

retained the lawyer to assist with negotiations with the defendant's insurance adjustor over the damage to her truck. *Jenks*, ¶15. We noted that the district court should evaluate the admissibility of evidence of insurance on a case-by-case basis under the facts and circumstances of each case. *Jenks*.

¶25. We found no abuse of discretion in the district court's decision to allow the shortly after the accident without any direct mention of insurance. *Jenks*, ¶28. The district court concluded that this course would remedy any prejudice caused by the defense counsel's repeated reference to the plaintiff's decision to retain a lawyer without permitting " the insurance bulldozer to be brought in to level the playing field." *Jenks*, ¶27,

¶35 The District Court here determined that it would not allow mention of insurance absent an exception to M. R. Evid. 411. Juror Butts initially raised the topic of insurance during voir dire. Juror Butts speculated that Wheatland county must possess some insurance, but he voiced concern as to whether the policy limits would cover the full amount of the verdict. Neither the court, nor the parties, took any step to disabuse Juror Butts, or the other members of the jury pool, that Wheatland County possessed some insurance coverage. The District Court did instruct the jury not to consider whether the County could afford to pay an award in determining damages. The court also instructed the jury not to consider whether an award would raise taxes and whether an award would provide a windfall to Eklund. Similar to *Jenks*, we cannot say that the solution crafted by the District Court to

address concerns raised by the jurors regarding who would be responsible for any award without expressly discussing Wheatland County's insurance coverage rose to the level of an abuse of discretion. *Wollaston*, 188 Mont. At 206, 612 P.2d at 1284.

¶36 The District Court also did not abuse its discretion when it restricted the depth of questioning regarding the availability of insurance during voir dire.

¶37. **Issue 4: Did the District Court err when it refused to strike a prospective juror for cause?**

¶38 A court may remove the cause members of a potential jury panel if they can be shown to have an interest in the action, an unqualified opinion or belief as to the merits of the action, or can be shown to have bias. Section 25-7-223(5)-(7), MCA. Voir Dire questioning revealed that juror Butts had a problem with suits against Wheatland County. He explained his concerns that, as a taxpayer, he could be responsible through increased taxes for any verdict returned against the county. Juror Butts reiterated his concern throughout voir dire regarding the source of an award. Juror Butts also maintained, however, that the could be fair and impartial. At no point during voir dire did juror Butts state that he was unwilling to be fair or that he would be biased. Juror Butts stated that he would follow the instructions and law given to him by the judge.

¶39 Eklund cites multiple cases where a juror demonstrated bias against one party and the court

removed for cause the potential juror. *See Mahan v. Farmers Union Central Exchange, Inc.*, 235 Mont. 410, 768 P.2d 850 (1989); *Crail Creek*. The potential jurors in these cases demonstrated actual bias.

¶40 For example in *Mahan*, one potential jury exhibited a fixed scruple against punitive damages, while the other stated he preferred management over employees in disputes. *Mahan*, 235 Mont. at 418, P.2d at 855. Juror Butts expressed some concern regarding the source of the money. Juror Butts did not express a fixed view against damages being awarded to the Plaintiff in a negligence action. Juror Butts also did not express favoritism for one side over the other in such a dispute.

¶41 The potential juror in *Crail Creek* likewise gave responses that reflected a biased state of mind. The potential juror admitted that she was inclined to favor contractors and that she did not know if she could set aside her bias. *Crail Creek*, ¶20. Juror Butts never expressed a bias toward either party. In fact, juror Butts, maintained that he could be impartial. When questioned about following the law and instructions, juror Butts replied, "I'm going to do the best of my ability what I'm instructed to do."

¶42 The trial judge stood in the best position to detect whether juror Butts demonstrated actual bias against Eklund. Juror Butts's hesitance regarding the size of a potential verdict does not lead us to believe that he would have been biased or would have failed to follow the law and instructions. The District Court did not abuse its discretion in denying the motion to remove juror Butts for cause.

¶43 Issue 5: Whether the District Court erred when it denied Eklund's motion for judgment notwithstanding the verdict (JNOV), or motion for new trial.

¶44 A court may grant a motion for direct verdict, or a motion for a JNOV, only when there is a complete absence of any evidence to warrant submission to a jury. *Ryan v. City of Bozeman*, 279 Mont. 507, 510, 928 P.2d 228, 229-30 (1996). Wheatland County points to evidence in the record that warranted submission of the case to the jury.

¶45 Undersheriff Les Christensen (Christensen) testified that he first saw the vehicle that crashed into Eklund about three miles east of Harlowton. Christensen's attempts to stop the vehicle proved futile. The speeding vehicle crashed soon after entering Harlowton. Christensen had slowed for safety purposes at the time of the crash. But he had kept the fleeing vehicle in sight. Christensen testified that about four minutes had passed from the time that he first saw the vehicle until he called for an ambulance after the crash. Christensen also testified that he did not form a road block, or take other drastic measures to stop the speeding vehicle.

¶46 Christensen's passenger, Montana Highway Patrolman James Rosenberg (Rosenberg), testified that Christensen had followed proper procedures for a high speed pursuit. Katherine Parks (Parks) witnessed the stolen vehicle approach town followed by Christensen. Parks testified that the stolen vehicle was traveling at a high rate of speed, but

that the police vehicle did not appear to be going nearly that fast.

¶47 In light of this testimony, Eklund cannot make the necessary showing that there was a complete absence of credible evidence to support the verdict in favor of Wheatland County. Counsel for Wheatland County elicited sufficient testimony regarding the timing and policies followed by the officers in pursuit. The District Court did not err when it denied Eklund's motion for JNOV and his request for a new trial motion.

¶48 Affirmed.

/S/ BRIAN MORRIS

We Concur:
/S/ MIKE McGRATH
/S/ JOHN WARNER
/S/ JIM RICE

Justice Patricia O. Cotter dissents.

¶49 I dissent from the Court's resolution of Issue Three. I would reverse and remand for a new trial.

¶50 The District Court erred when, citing M. R. Evid. 411, it completely prohibited any mention of an insurance or pooling arrangement. In *Jenks v. Bertelsen*, 2004 MT 50, 320 Mont. 139, 86 P.3d 24, cited prominently by Eklund but not in my judgment adequately considered in the Court's analysis, we noted that under our previous case law there are a number of exceptions to the general prohibition against injection insurance issues into a case under

M. R. Evid. 411. *See Jenks*, ¶¶23-24. We cautioned that such cases "do not represent an exhaustive survey . . . ." *Jenks*, ¶25. When the District Court issued a prohibition on any mention of insurance prior to trial, it did so under the evident assumption that the exceptions to M. R. Evid. 411 were fully codified, and that failure to meet a specifically enumerated exception to M. R. Evid. 411 prohibited, *ipso facto*, any mention of insurance. The District Court's approach to this issue was contrary to *Jenks*. "In the final analysis, Rule 411, M.R. Evid., and the exceptions thereto, do not present a clear mandate of either admitting or denying evidence of liability insurance. What is clear, however, from a review of the case law, is that district courts have broad discretion in determining the admissibility of evidence pertaining to liability insurance . . . ." *Jenks*, ¶25. Thus, district courts should evaluate the admissibility and effect of a mention of insurance on a case-by-case basis under the facts and circumstances then presented to the court. *Jenks*, ¶25.

¶51 The facts and circumstances presented in this case called for an exercise of discretion in favor of revealing the existence of insurance. Eklund sought to disclose the existence of an insurance pooling arrangement to allay the concerns of the citizens of this small county about the potential impact of a sizeable verdict upon them. However, he was prohibited by the District Court from doing so, and was instead only permitted to inquire whether any of the jurors' status as taxpayers would affect their ability to render a judgment against Wheatland County. In other words, he was allowed to raise

their worries but not relieve them. When Eklund's counsel attempted during voir dire to walk this fine line, one of the potential jurors, Butts, zeroed in quickly on the forbidden topic. He said:

> Wheatland County, which is made up of people that live here. And we're certainly insured by an insurance company, I would think, that might be responsible for all of the money. I don't know how much of that would be passed onto the citizens or residents of the county. I mean I don't know, so I'm a little apprehensive. And, you know, I'll follow the law and what I'm instructed to do the best that I can, but some of us have ingrained prejudices already that may taint our decision or judgment. And I'm not trying to be difficult here. I'm just trying to be honest okay.

The question was thus early and squarely presented in the presence of the entire panel: Do we have insurance, and is it enough? Yet, the District Court would not allow the question to be answered, placing Eklund in an even worse position than he occupied before the answer was given.

¶52 Remarkably, the District Court denied Eklund's request to have this juror dismissed for cause, even though he clearly indicated that he had an "ingrained prejudice" on the issue of the source of payment for any judgment against Wheatland County. This candid statement from the juror was

an unequivocal demonstration of concern at best, and bias at worst, especially given Eklund's inability to allay the spoken concerns. Under other circumstances, I would conclude that the District Court committed reversible error by failing to dismiss Butts for cause. Here, however, I doubt that excusing him for cause would have made any difference, once the entire panel heard the insurance question asked but go unanswered.

¶53 The effect that this statement had on Eklund's right to receive a fair trial cannot be overstated. After Butts made his statement, the District Court gave no corrective instruction or admonishment, and then rejected attempts to have this juror removed for cause. This was a clear signal to the members of the jury that their questions about where the money would come from, and the extent to which any insurance arrangement would cover them, would not be answered, and further that having such worries would not disqualify them from serving on the panel. In fact, a second juror voiced these same unanswered concerns. That juror was seated.

¶54 Once these overt concerns about whether there was any insurance to protect the county were laid before the entire jury panel, the District Court should have reevaluated its position with regards to the mention of insurance. I conclude that the District Court's blanket prohibition on any mention of insurance constituted an abuse of discretion at this point, and was unreasonable in light of Eklund's constitutional right to a fair and impartial trial. *Jenks* and M. R. Evid. 411 clearly allowed the District court to take corrective action and briefly

explain the insurance arrangement, since it would be done not to prove negligence or wrongful action on behalf of Wheatland County, but only to ensure that the jury's concerns were allayed sufficiently to allow Eklund a fair and impartial trial.

¶55 At the conclusion of trial, the District Court gave the following jury instructions:

> In determining the amount of damages, you may not consider, even a little, the following:
>
> 1) Whether the Defendant can afford it.
> 2) Whether it might raise your taxes.
> 3) Whether it is a windfall.

¶56 As an initial matter, I find it hard to reconcile the District Court's instruction that jurors were to to consider "even a little" whether a judgment against Wheatland County would raise their taxes, with its denial of Eklund's request to have Butts dismissed for cause. For not only did this juror consider the issue significant "ingrained prejudice" and would have an impact on his deliberation. These two rulings are simply irreconcilable in my judgment.

¶57 The greater problem is that his instruction compounded the prejudice to Eklund, who sought to have the prospect of insurance at least mentioned in the list of factors "not to be considered." Essentially, the instruction highlights the three negative prospects that a verdict for the Plaintiff would present–one, we can't afford this; second, it might raise our taxes; and third, the Plaintiff may reap a

windfall at our expense. In highlights no potentially saving factors, like the existence of insurance, again making matters worse for Eklund.

¶58 In sum, the handling of voir dire, the restrictions on Eklund, and the District Court's instruction combined at best to leave the jury panel actively worried throughout trial about what a verdict might mean to their pocketbooks. At worst, the refusal to address the jury's concerns and the ensuing refusal to mention insurance in the instruction may well have left the impression that no insurance existed at all. Either way, Eklund was prejudiced.

¶59 At a fundamental level, the District Court's unreasonable disregard to the jury's concerns placed Eklund, an innocent and badly injured citizen, at a severe disadvantage. Leaving the front-burner question of how a verdict might be satisfied unresolved in the minds of the jurors from this small rural town prevented him from having his case decided on the merits. While similar concerns seldom arise in larger states, or even within larger counties in Montana, there they were open and real. The District Court should have weighed the "competing concerns," and employing its "conscientious judgment," *see Jenks*, ¶28, should have either allowed Eklund to reference an insurance agreement, or told the jury directly that an arrangement of some sort existed. After all, Eklund himself is a taxpayer too and deserves, as do all the citizens of this state, the opportunity for a fair and impartial trial. I believe the District Court's rulings in this case unreasonably denied him this

right and constituted an abuse of discretion. I would revers and remand for a new trial and respectfully dissent from the Court' failure to do so.

/S/ PATRICIA COTTER

KATHERINE M. IRIGOIN
District Judge, Department 2
Seventh Judicial District
201 West Main Street
Sidney, MT 59270
Telephone: (406) 433-5939
Facsimile: (406) 433-6879

MONTANA FOURTEENTH JUDICIAL
DISTRICT COURT
WHEATLAND COUNTY

DONALD S. EKLUND,	)
	) Cause No. DV 01-13
Plaintiff,	)
	) Judge Katherine M.
vs.	) Irigoin
	)
WHEATLAND COUNTY	) ORDER DENYING
and its Sheriff,	) MOTIONS FOR
JAMES ROSENBERG	) JUDGMENT
	) NOTWITHSTANDING
	) VERDICT AND FOR
	) NEW TRIAL
Defendants.	)

Pursuant to Mont. R. Civ. P. Rule 59(g), the Plaintiff filed timely Motions for Judgment Notwithstanding Verdict and for New Trial. The Defendants filed an Answer Brief opposing the Motions. The Plaintiffs filed a reply brief. The matter is fully briefed, and the Court is prepared to rule.

The Defendants' position being more persuasive, **IT IS HEREBY ORDERED** that the Plaintiff's Motions for Judgment Notwithstanding Verdict and for a New Trial are **DENIED**.

DATED this 15th day of June, 2008.

Katherine M. Irigoin
District Court Judge

I hereby certify that I have mailed a true copy of this document to Thomas Towe, Norman Grosfield by depositing same in the U.S. Mail this 6th day of April 2007, J. Hill, Clerk of the District Court

MONTANA FOURTEENTH JUDICIAL
DISTRICT COURT
WHEATLAND COUNTY

DONALD S. EKLUND,	)
	) Cause No. DV 01-13
Plaintiff,	)
	) Judge Katherine M.
vs.	) Irigoin
	)
WHEATLAND COUNTY	) ORDER DENYING
and its Sheriff,	) PLAINTIFF'S MOTION
STEVE RIVELAND	) FOR CHANGE OF
	) VENUE
Defendants.	)

In 2001, the Plaintiff, Donald S. Eklund ("Eklund"), filed suit in Wheatland County against various defendants for claims related to injuries he suffered when he was struck by a motor vehicle in Harlowton. The defendants were released from liability based upon summary judgment or trial verdict. Eklund appealed from the orders granting summary judgment and from evidentiary orders surrounding the jury trial. On December 14, 2006, the Montana Supreme Court affirmed the release of all defendants except Wheatland County and its Sheriff Steve Riveland. The Clerk of the Supreme Court issued Remittitur on January 5, 2007, a copy of which Eklund received on January 8, 2007.

On January 8, 2007, the date that he received the Remittitur, Eklund mailed to opposing counsel and others Plaintiff's Motion for Change of Venue and Brief in Support. The Motion was filed January 10, 2007. On January 22, 2007, the Defendants, Wheatland County and its Sheriff, Steve Riveland ("Wheatland County"), filed their answer brief opposing the motion for change of venue. On February 15, 2007, Eklund filed Plaintiffs' Notice to the Court, attached to which were two articles published in the official newspaper of Wheatland and Golden Valley Counties: A January 11, 2007, article covering the Montana Supreme Court's decision, and a February 8, 2007, article covering Eklund's motion for change of venue. On February 8, 2007, Eklund file his reply brief. The Court deems the matter submitted and is prepared to rule.

I. Eklund's Motion for Change of Venue was Timely Filed.

Eklund argues that venue should be changed pursuant to §25-2-201(2), MCA. In particular, Eklund argues that "there is reason to believe that an impartial trial cannot be had" in Wheatland County, the county which is otherwise the proper count for venue, because most, if not all, of the jurors will be Wheatland County taxpayers prejudiced by the possible financial considerations regarding increased taxes.

Eklund further argues that, pursuant to Mont. R. Civ. R. 12(b)(iii), the time period for filing a motion for change of venue is extended to 20 days after the January 5, 2007, Remittitur, not 20 days

after the Montana Supreme Court's December 14, 2006 decision. As competent proof of the extended filing triggering event, Eklund offers the Montana Supreme Court's decision. Eklund argues that the Montana Supreme Court decision affords good cause to believe that an impartial trial cannot be had under ¶25-2-201(2), MCA, because it affirms the reduction from 11 defendants, including some non-local defendants, to two local defendants, and a judgment against only local defendants is more likely to result in increased taxes.

Wheatland County argues that, because Eklund did not file his motion for change of venue within 20 days of the Montana Supreme Court's December 14, 2006, decision, it was not timely filed under Mont. R. Civ. P. 12(b)(iii). Eklund argues convincingly that the 20-day extended filing period should begin from the issuance of the Remittiture, not the filing of the Montana Supreme Court decision because the district court lacked jurisdiction until remittitur was issued. In this case, the parties had the right to Petitioner for rehearing within 10 days after the December 14, 2006, Montana Supreme Court decision. Mont. R. App. P. 34. A petition for rehearing would consequently have to be filed on or before January 4, 2007. Remittitur was issued January 5, 2007, consistent with Mont. R. App. P. 35(b) that remittitur "shall be issued promptly upon expiration of time for filing petition for rehearing . . ." Eklund did not file his motion for change in venue late when he filed it within 20 days of the issuance of the January 5, 2007, Remittitur.

II. Taxpayers as Jurors Do Not Prevent an Impartial Trial

The "proper place of trial for an action against a public officer" like a sheriff "is the county where the cause or some part thereof arose." §25-2-126(2), MCA. Here, Eklund claims he was injured by the crash in Wheatland County and does to deny that the Sheriff was acting in his official capacity. Wheatland County consequently is the proper county statutorily in which to sue Wheatland County and its Sheriff. The inhabitants of a county are competent jurors on an action in which the county is interested if the inhabitants are otherwise competent and qualified to act as jurors. §3-15-302(2), MCA.

The Fourth Amendment of the Constitution of the United States and Section 17, Article II, Constitution of Montana, guarantee the right to a fair trial by an impartial tribunal as part of due process. Montana has not yet determined that taxpayers are not impartial in cases involving local governmental entities or elected officials. On the contrary, the Montana Supreme Court has affirmed the denial of a motion to change venue based on the possible effect of juror-taxpayers' "pecuniary interests" and local prejudice. *School Dist. No. 1 v. Globe & Republic Ins. Co.* (1963), 142 Mont. 220, 383 P.2d 482. As convincing as contrary law from other jurisdictions may be, it is not present Montana law.

ORDER

Plaintiff's Motion for Change of Venue is therefore **denied.**

DATED this 29th day of March, 2007.

Katherine M. Irigoin
District Court Judge

I hereby certify that I have mailed a true copy of this document to Thomas Towe, Norman Grosfield by depositing same in the U.S. Mail this 6th day of April 2007, J. Hill, Clerk of the District Court

THOMAS E. TOWE, ESQ.
TOWE, BALL, ENRIGHT, MACKEY
& SOMMERFELD, P.L.L.P.
2525 Sixth Avenue North
P. O. Box 30457
Billings, MT 59107-0457
(406) 248-7337 (Office)
(406) 248-2647 (Facsimile)

Attorneys for Plaintiff.

MONTANA FOURTEENTH JUDICIAL DISTRICT
COURT
WHEATLAND COUNTY, MONTANA

DONALD S. EKLUND,	)No. DV-01-13
	)
	)Judge Katherine Irigoin
Plaintiff	)
	)
vs.	)PLAINTIFF'S MOTION
	)FOR CHANGE OF
ROY TROST, LYNN	)VENUE AND
HAMILTON,	)BRIEF IN SUPPORT
Custodian for Roy Trost;	)
CARL MOODY;	)
WHEATLAND COUNTY	)
COUNTY and its SHERIFF	)
STEVE RIVELAND; and	)
YELLOWSTONE COUNTY	)
and its subordinate	)
YELLOWSTONE COUNTY	)
YOUTH SERVICE CENTER	)

DONNA MARMON, Juvenile Probation Officer, and her employers, GOLDEN VALLEY COUNTY, WHEATLAND COUNTY, MEAGHER COUNTY, and MUSSELSHELL COUNTY,

Defendants.

The Plaintiff, DONALD S. EKLUND, and moves the Court for a change in venue. See Brief in support of this motion that follows.

Norm Grosfield, counsel for Wheatland County and its Sheriff, Steve Riveland, has indicated that he probably will oppose this motion.

BRIEF IN SUPPORT OF MOTION

I.
FACTUAL AND PROCEDURAL BACKGROUND.

This case was filed in Wheatland County against numerous Defendants because the accident took place in the City of Harlowton. The defendants at that time were Roy Trost, the minor who caused the accident, Lynn Hamilton, his mother, Carl Moody, his grandfather whose vehicle he was driving, Wheatland County and Steve Riveland, its Sheriff, Yellowstone County Youth Services Center. Later, Donna Marmon, Golden Valley County, Wheatland County, Meagher County and Musselshell County were joined as Defendants. Initially, Carl Moody was dismissed as a party on a

motion for summary judgment as was Wheatland County and its Sheriff, Steve Riveland. Later, Donna Marmon and Golden Valley County, Wheatland County, Meagher County and Musselshell County, Donna Marmon's employers, were dismissed on motions for summary judgment. Lynn Hamilton and Roy Trost settled for approximately $20,500.00 (the amount in Roy Trost's trust fund and a minor contribution from Lynn Hamilton). The case then went to trial against Yellowstone County Youth Services Center.

The trial resulted in a defense verdict. On appeal, the Montana Supreme Court affirmed the actions releasing Donna Marmon and the four counties that employed her and the verdict of the jury in favor of Yellowstone County Youth Services Center, but reversed the Summary Judgement granted in favor of Wheatland County and its Sheriff, Steve Riveland, regarding the high speed chase through the City of Harlowton. On remand, the only case that remains is Wheatland County and its Sheriff, Steve Riveland, regarding the high speed chase through town.

Deputy Sheriff Lesley Christensen, initially heard the bulletin while on an errand to Judith Gap. When it was determined that the car was headed toward Harlowton, he went toward Roundup to intercept it. When he saw the vehicle a couple of miles out of Harlowton coming toward him he attempted to stop it, but it went right on by. He turned around and with his siren going and red lights flashing, he chased Trost all the way into town and through the edge of town and into the main part

of town where the highway crosses the main business street.

Officer Lesley Christensen went past the city limit sign, which is posted at 45 mph. As he neared the IGA grocery store, he noticed that he was traveling somewhere between 75 and 80 miles per hour, and the suspects were not slowing down or pulling over. He stated that as they continued into town he kept hoping the suspects would stop, but they did not. As he neared the IGA grocery store, he started to slow down because "I realized that we were going way too fast in town and that someone was going to get hurt." Exhibit K. Officer James Rosenberg, a highway patrol that was riding with Lesley Christensen at the time, estimated they were traveling 75-80 miles per hour when they entered town. Exhibit L.

There is also evidence that Christensen knew the driver of the truck was a juvenile and that he realized that the truck driven by juveniles was not likely to stop when things got dangerous. Exhibit M. The Wheatland County Sheriff's Office has a policy manual which describes procedures for pursuit. It is Plaintiff's contention that Officer Christensen failed to comply with this procedure.

While traveling at a high rate of speed through town, Roy Trost, driving a stolen pickup, clipped the front end of another car, and careened across the road and across the parking lot ultimately striking Donald S. Eklund in the parking lot just as he was getting out of his truck to go into the barber shop to get a haircut. Eklund was tossed into the air

and landed on the hard surface parking lot after the vehicles went on through. Thus, he defied all odds by surviving the accident, but he did lose his spleen, suffered a collapsed lung, numerous serious puncture wounds, lacerations, abrasions, and many other serious and permanent injuries.

II.

ARGUMENT

A. THE MOTION FOR CHANGE OF VENUE IS TIMELY.

The time for filing a motion for change of venue is set forth in Rule 12(b)(iii) of the Montana Rules of Civil Procedure and it reads as follows:

> iii. Any request for change in place of trial for grounds 2 and 3 of § 25-2-201, MCA, must be presented by motion within 20 days after the answer to the complaint, or to the cross-claim where a cross-claim is filed, or the reply to any answer, in those cases in which a reply is authorized, has been filed; **except that whenever** at some time more than 20 days after the last pleading has been filed **an event occurs which thereafter affords good cause to believe that an impartial trial cannot**

> **be had under ground 2 of said §25-2-201**, and competent proof is submitted to the court that such cause of impartiality did not exist within the 20-day period after the last pleading was filed, **then the court may entertain a motion to change the place of trial under ground 2 of §25-2-201 within 20 days after that latter event occurs**.

Rule 12(b)(iii) of the Montana Rules of Civil Procedure (emphasis supplied.)

Plaintiff contends that the Decision of the Montana Supreme Court in which all complaints and claims against parties other than Wheatland County where upheld leaving Wheatland County as the only Defendant, is an event that affords good cause to believe an impartial trial cannot be had in Wheatland County. This motion is being filed within 20 days of that event.

Plaintiff contends that an impartial trial cannot be had in Wheatland County in a case against Wheatland County and its Sheriff, Steve Riveland, because the jurors will be primarily, if not all, taxpayers of Wheatland County and will be affected in their pocketbooks by the judgment. They cannot be impartial. It will not be possible to find sufficient jurors who are not taxpayers within

Wheatland County and, consequently, there is a huge bias or problem. Plaintiff cannot possibly receive an impartial jury in Wheatland County if all jurors are taxpayers of Wheatland County. See Plaintiff's argument in the next issue. Obviously, while other parties existed, the focus would not be on the taxpayers of Wheatland County. Now, however, because of the action of the Montana Supreme Court, the only Defendant remaining is Wheatland County. The Decision of the Montana Supreme Court is an event which affords good cause to believe an impartial trial cannot be held in Wheatland County and, therefore, Rule 12(b)(iii) applies to this situation.

B. AN IMPARTIAL JURY CANNOT BE OBTAINED IN WHEATLAND COUNTY ANYMORE.

Unlike the initial case against numerous Defendants in various Counties - initially there were nine separate Defendants, including Wheatland County and its Sheriff, Steve Riveland - now there is but one Defendant, namely, Wheatland County. The change of venue statue reads as follows:

> **When change of venue required.** The court or judge must, on motion, change the place of trial in the following cases:
>
> (1) when the county designated in the

> complaint is not the proper county;
>
> (2) when there is reason to believe that an impartial trial cannot be had therein;
>
> (3) when the convenience of witnesses and the end of justice would be promoted by the change.

§25-2-201, MCA. Plaintiff invokes both (2) and (3). First, there is reason to believe that an impartial trial cannot now be held in Wheatland County because the only Defendant is Wheatland County and virtually all jurors will be taxpayers of Wheatland County specifically affected in their pocketbook by their decision of themselves, the jury. Secondly, the ends of justice would be promoted by a change for this same reason.

The bias to Plaintiff in requiring Plaintiff to go to trial in a county in which the jurors are made up of taxpayers who will be directly affected by the outcome of the case should be obvious. Whether or not the County is insured for such damages, the taxpayers are bound to be affected. If the County is fully insured there may well be an increase in premiums or a problem in obtaining additional and future insurance. If the County is not insured fully, there will be payments out of the general fund to pay for any verdict. This is not an idle concern in as much as Plaintiff has been claiming total damages of

$1,534,676.15. (That number was presented prior to the Montana Supreme Court Decision and may need to be updated.) Any request of that nature will scare any taxpayer. Any logical and reasonable taxpayer will assume their own taxes will be affected whether they are fully insured or not because the numbers are so large. Because it affects each taxpayer's own pocketbook, there is no way a taxpayer can be an impartial or unbiased jurors. Even tenants who own no real estate of their own will be affected because increased taxes will affect the rent they pay. Consequently, there is no way to avoid the bias from any jury selected in Wheatland County. It would be like asking stockholders to be jurors in a $1.5 million case against a corporation. It would be fundamentally unfair.

It is true that Montana generally rejects the notion that County taxpayers would be biased jurors in a case in which the County is a party because the County taxpayers risk higher taxes if the County loses. In effect, the Courts in this State have held that taxpayer status is not grounds for juror disqualification. See *Goodnough v. State*, 199 Mont. 9, 18, 647 P.2d 364, 369 (1982); *Keith v. Liberty County Hosp. and Nurs. Home*, 183 Mont. 39, 41, 598 P.2d 203, 204 (1979) and cases cited therein. First, none of the cases include claims as large or as serious as the claim in this case and the Montana Supreme Court may not consider either as good precedent in the instant case. Second, a closer look at these and other cases indicate that courts are not prohibited from granting a motion for change of venues. It is simply that their discretion will be considered abused by denying the motion or that the

motion was not timely filed. See *Keith*, 183 Mont. at 40, 598 P.2d at 204 (Plaintiff waived her right to a change of place of trial for failure to timely move therefore.); *Goodnough*, 199 Mont. at 19, 647 P.2d at 369 (the trial court committed error in not allowing Plaintiffs to question perspective jurors about their beliefs as taxpayers concerning the financial outcome of the case, but this error was harmless because the jury returned a verdict for the Defendant and did not need to reach the question of damages); *Mannix v. Butte Water Co.*, 259 Mont. 79, 88, 854 P.2d 834, 841 (1993) (the lower court did not abuse its discretion in denying plaintiff's motion for change of venue especially where the taxpayer issue was not the only basis on which the respondents relied or on which the district court based its decision); *Carter County v. Cambrian Corp.*, 143 Mont. 193, 194-95, 99, 387 P.2d 904, 904-05, 907 (1963) (The district court did not abuse its discretion in denying a motion for change of venue where the defendants sought a change of venue in an action by the county against them for damages to a bridge. The amount in controversy was a mere $50,000.00.)

By contrast, in other jurisdictions the issue is recognized. See *Olson v. City of Sioux Falls*, 63 S.D. 563, 262 N.W. 85 (1935) (Order granting change of venue was affirmed); *Sheridan County v. Davis*, 61 N.D. 744, 240 N.W. 867, 871 (1932) (Although the jurors may not be subject to challenge for cause, a wise discretion in deciding a motion for a change of place of trial might require a transfer of a case, where it appears that every perspective juror will have a small interest as a taxpayer averse to the moving party). In the latter case, the Court stated:

> However, though no juror might have been subject to challenge for cause, it does not follow that the Court wisely exercised its discretion in denying the application for a change of place of trial. It is one thing to hold that a juror may not be challenged for cause on a count of a very small interest which he may have as a taxpayer, but quite another thing to conclude that an entire jury of taxpayers, each of whom is interested to a small degree adversely to the defendant, gives that assurance of a fair trial to which every litigant is entitled.

Sheridan County, 240 N.W. at 871. On that basis, the Supreme Court of North Dakota reversed the judgment because the defendants did not have a fair trial.

It is respectfully submitted the same applies in the instant case, only worse. Because the sums of money claimed are so large, it is bound to have an impact. There is no way the jury can be unbiased under these circumstances. Clearly, they will perceive, whether actual or not, that they will have to dig into their own pockets to pay the judgment if

the amounts requested are awarded. Thus, because the damages are so great in the instant case, it is not possible for Plaintiff to obtain a fair and impartial jury made up of taxpayers from Wheatland County. This Court must exercise its discretion and grant the motion for change of venue.

RESPECTFULLY SUBMITTED this 8th day of January, 2007.

TOWE, BALL, ENRIGHT, MACKEY SOMMERFELD, P.L.L.P.

By: /s/ Thomas E. Towe
THOMAS E. TOWE
Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of January, 2007, a true and correct copy of the foregoing *Plaintiff's Motion for Change of Venue and Brief in Support* was duly served by United States Mail, postage prepaid, upon the following:

KEVIN GILLEN, ESQ.
Deputy Yellowstone County Attorney
P. O. Box 35025
Billings, MT 59107-5025

NORMAN H. GROSFIELD, ESQ.
Utick & Grosfield
P.O. Box 774
Helena, MT 59624

STEVEN MILCH, ESQ.
Crowley Law Firm
P. O. Box 2529
Billings, MT 59103-2529

THE HONORABLE KATHERINE IRIGOIN
201 West Main Street
Sidney, MT 59270

TOWE, BALL, ENRIGHT, MACKEY & SOMMERFELD, P.L.L.P.

By:/s/ Thomas E. Towe
Thomas E. Towe

No. 09-426

SUPREME COURT, U.S.
FILED
JAN - 5 2010

In The Supreme Court of the United States

DONALD S. EKLUND,

Petitioner,

v.

WHEATLAND COUNTY, MONTANA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

NORMAN H. GROSFIELD
Counsel of Record
DEE ANN G. COONEY
GROSFIELD LAW FIRM
44 North Last Chance Gulch, Ste. 5
P. O. Box 5015
Helena, MT 59604-5015
Telephone: 406.443.7295
norm@grosfieldlaw.com

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

In an action where a plaintiff alleged negligence by county law enforcement officers, is the fact the jury was comprised of taxpayers from the defendant county a violation of the injured party's right to due process under the Fifth and Fourteenth Amendments?[1]

---

[1] The Petition makes reference only to the Fourteenth Amendment. This Court has stated that a " . . . generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights." *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988). However, Petitioner did reference the Fifth Amendment in his pleadings in the court below.

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JURISDICTION

The decision of the Montana Supreme Court rested on adequate and independent state law grounds and should preclude this Court's review. The opinion below hinged on specific state statutes which govern jury trials and reflected the propriety of granting broad discretion to a state trial court in matters of jury selection and impartiality, especially in cases limited to state law claims such as those at issue in the underlying action. The decision was appropriately based upon long-standing state law precedents rendered by the Montana Supreme Court in reviewing jury trials within the state. No federal law was invoked; no federal guidance was required for the Montana Supreme Court to properly decide the issues before it. The opinion rendered was neither spurious, nor evasive.

Nothing would be gained by this Court's review of the central due process challenge because the panoply of such protections specified in the Montana Constitution's Declaration of Rights (Article II, Sections 1-35), are greater than those set forth in both the U.S. Constitution and recent decisions of this Court. Particularly in matters of substantive due process this Court increasingly casts doubts about its belief in the existence and extent of such rights. *District Attorney's Office v. Osborne*, 557 U.S. ___, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009). The Montana Supreme Court has not expressed any such reservations, and broad constitutional rights are well recognized and enforced in the state. See *Snetsinger*

v. Montana University System, 2004 MT 390, ¶¶ 54-55, 325 Mont. 148, 104 P.3d 445 (holding that the university system's policy of denying health benefits to unmarried same-sex couples while granting benefits to opposite-sex couples is a denial of equal protection, Nelson, J. concurring). In addition, the Montana Supreme Court has long considered all rights set forth in the Declaration of Rights to be "fundamental" triggering the highest level of scrutiny. *Id.* at ¶ 56. If that Court did not find a constitutional violation here under Montana's broader, more protective rule of due process law, clearly there is no required "compelling reason" under Rule 10 for this Court to accept jurisdiction. The state law grounds are more than adequate.

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to those listed in the Petition, the Montana Supreme Court had before it an additional statute wherein the Montana Legislature established proper venue for an action against a "public officer" as being the county where the cause arose. *Section 25-2-125, MCA.*

STATEMENT OF THE CASE

Petitioner/Plaintiff Donald Eklund ("Eklund") filed this action based on allegations of negligence by

various parties in relation to injuries he suffered as a result of a motor vehicle accident. The specific allegations against Respondents/Defendants Wheatland County and its Sheriff ("the County") stemmed from the actions of certain Wheatland County deputies regarding their attempt to apprehend the driver of a stolen vehicle. The accident occurred during that attempt.

The County filed a motion for summary judgment arguing its defendants were entitled to judgment as a matter of law as to any alleged negligence. The District Court granted the County's motion. The matter first went to trial against one of the remaining defendants; a Wheatland County jury returned a verdict for the defense. Eklund appealed the verdict and the grants of summary judgment in favor of various defendants. The Montana Supreme Court affirmed the jury verdict and summary judgment for all defendants except Wheatland County and its Sheriff. *Eklund v. Trost*, 2006 MT 333, 335 Mont. 112, 151 P.3d 870 (*Eklund I*). The procedural history upon remand is fully explained in the decision at issue here. *Eklund v. Wheatland County*, 2009 MT 231, ¶¶ 9-13, 351 Mont. 370, 212 P.3d 297.[2]

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[2] Respondents refer the Court to the official or unofficial reports of the decision rather than Petitioner's Appendix which appears to contain a number of typographical errors not in the original.

The facts **material** to consideration of the question presented are straightforward. The initial specific claim against the County related to a short, high speed chase which involved Wheatland County deputy sheriffs seeking to apprehend the driver of a reported stolen vehicle. The driver lost control of the vehicle; Mr. Eklund was seriously injured when the vehicle struck him. Because the Petition claims there was "overwhelming evidence" of negligence, Respondents must set forth the facts relating to the pursuit in some detail. Actions taken by the law enforcement officers were recorded in the dispatch radio log for the shift in question. That log was entered as Trial Exhibit (*Trial Ex.*) *87*; it provides a timeline crucial to proper consideration of alleged negligence by the officers because it shows what the officers knew and when they knew it.

At **9:59** a.m. on June 11, 2001, the Wheatland County dispatcher (Ms. Pallas) received a telephone call from the Musselshell County dispatcher (Rosie). Rosie stated she would be putting out an "Attempt to Locate" for a "signed stolen" vehicle which had been reported from Roundup, Montana. *Trial Ex. 87*, p. 1.[3] Shortly thereafter, Ms. Pallas radioed the following information to all units, Wheatland County and Musselshell County:

---

[3] A "signed stolen" means the registered owner has signed a complaint stating she will prosecute the individual(s) who stole the vehicle. On this basis an officer can arrest the individual(s), not just stop and identify the person(s).

> Stand by for an ATL on a signed stolen out of Musselshell County. I received a report of a signed stolen out of Musselshell County on two (2) runaways from Billings. They are driving a red and maroon pickup with an overhead camper on it. There is (*sic*) no weapons in the vehicle. Pickup license plate number 23T-C276. It was reported that the teenagers there took the vehicle from Roundup approximately one hour ago.

Id., p. 5.

Contrary to a statement in the Petition (p. 6), no one at that time knew where the stolen vehicle was headed.

Wheatland County Undersheriff Les Christensen was the only officer on duty at the time. Contrary to Petitioner's statement (p. 6), when the initial call came in, he was in his vehicle traveling to a neighboring town (Judith Gap) for auto parts. He immediately radioed Ms. Pallas for more information, because he had not heard the entire radio message; he asked whether she had a more complete description of the pickup. She said yes:

> It's a '95 Dodge pickup, maroon and silver in color. Uhm, license is 23T-C276. One of the . . . the, ah, juveniles is from Meagher County and the other one is said to have a cabin . . . a cabin in the Martinsdale area . . . his parents do.

Id.

No one was certain as to the direction of travel of the Dodge; it had not been seen. *Trial Ex. 28*, p. 2.

At **10:55** a.m., Ms. Pallas next made contact with Undersheriff Christensen, who was then traveling south from Judith Gap. She relayed information the vehicle had been sighted by an informant in the neighboring town of Ryegate and was believed to be heading west toward Harlowton, a distance of 30 miles. This was the first time the stolen vehicle's direction of travel was known. Christensen agreed to head in that direction to assist. At **11:01** a.m., Christensen reported his location was 9 miles north of Harlowton. *Trial Ex. 23*, pp. 5-7; *Trial Ex. 87*, p. 2.

At **11:11** a.m., Undersheriff Christensen reported he had just met the stolen vehicle on Highway 12 three miles east of Harlowton. At **11:15** a.m., four minutes after Christensen's initial sighting of the Dodge, he called for emergency medical assistance because an accident involving the stolen vehicle had occurred. *Trial Ex. 87*, p. 2.

When Undersheriff Christensen had attempted to apprehend the Dodge just east of Harlowton, he and his passenger (Montana Highway Patrolman Jim Rosenberg, now Wheatland County Sheriff and named Defendant here) never saw the driver nor any other occupant of the Dodge. *Trial Ex. 28*, p. 10; *Trial Ex. 29*, p. 8. When Christensen's vehicle met the Dodge, Rosenberg observed:

> I didn't notice that they were traveling at a real high rate of speed at that time. You

> know, with the speed limit being at seventy (70), it didn't. . . . It didn't appear to me that they were going at a real high rate of speed, but then I wasn't . . . I wasn't judging that. I was trying to make sure to look to see if this vehicle mid . . . met the description and then I was trying to see the plates on the vehicle as it went by us.
>
> * * *
>
> And I mean, was it . . . was it going exceptionally fast to where I noticed it was going exceptionally fast, I don't believe so.

Trial Ex. 29, pp. 6-7.

When and after Undersheriff Christensen executed a U-turn to follow the Dodge, the speed of the two vehicles stayed at seventy (70) to eighty (80) miles per hour, until Christensen slowed down to approximately fifty (50) miles per hour when he realized both vehicles were going too fast in town. *Trial Ex. 29*, p. 3; *Trial Ex. 28*, pp. 5-6. Another driver witnessed the stolen Dodge, followed by Christensen, approach Harlowton. She testified the Dodge was traveling at a high rate of speed, but the police vehicle was not going especially fast. *Trial Transcript*, (*Trans.*), pp. 541-542.

These are the facts as related in real time by way of radio dispatches, plus contemporaneous recollection of an event that took four minutes to develop. The first contact the County's officers had with the stolen vehicle occurred at 11:11 a.m.; the tragic

accident had occurred by **11:15** a.m. when the pursuing officer called for emergency medical assistance.

REASONS FOR DENYING THE PETITION

Review is inappropriate for several reasons. First, this Court should not accept jurisdiction because the decision below rested on independent and adequate state law grounds.

Second, the Petition is based upon expansive contentions and gross assumptions; it relies on allegations of improper interest by veniremen which are highly speculative and contingent.

Third, the Montana Supreme Court correctly applied well settled law in finding the trial court did not abuse its discretion in the matter of jury selection. In essence, the Petitioner simply seeks a different result than the one rendered by that court which was grounded in long-established, properly stated rules of law.

Fourth, the Petition rests in large part upon unwarranted allegations of factual error by the jury because it did not find the County negligent; such error, if any, is not appropriate for review under Rule 10.

Fifth, the Montana Supreme Court did not decide an important question of federal law that has not been, but should be, settled by this Court; nor has it

decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sixth, the Montana Supreme Court correctly decided the case on the merits.

ARGUMENT

I. The decision below rests on independent and adequate state law grounds.

Petitioner's constitutional challenge is, and has consistently been, an as-applied challenge to the statutes rather than a facial challenge. An as-applied challenge by its very nature is heavily fact-driven, especially when it involves matters relating to *voir dire* and a jury's verdict. For this Court to accept review, it will be required to invade matters which historically have been the province of a trial judge. Such an intrusion is particularly inappropriate here because the due process protections granted under the state law, upon which the Montana Supreme Court based its decision, are greater than those afforded by federal law.

The Montana Constitution protects individual rights and liberties more broadly than the U.S. Constitution, and certainly more broadly than is reflected in recent decisions of this Court. Research by a respected Montana constitutional scholar shows that 17 specific protections memorialized in the "Declaration of Rights" in the Montana Constitution have

no parallel in the federal Constitution. *Dorwart v. Caraway,* 2002 MT 1, ¶ 86, 312 Mont. 1, 58 P.3d 128 (Nelson, J., concurring). Also, the Montana Supreme Court has long considered all rights set forth in the Declaration of Rights to be "fundamental" thereby triggering the highest level of judicial scrutiny. *Snetsinger, supra*, 2004 MT 390, ¶ 56, 325 Mont. 148, 104 P.3d 445.

These many protections of individual rights are not hollow paper promises in Montana. As noted by Justice Nelson in the *Snetsinger* decision, the Montana Supreme Court has often breathed life into liberties such as the right to participate, the right to know, the right to individual dignity, right to privacy, right to a clean and healthful environment, and the right to personal autonomy. *Id.*, at ¶ 55. It is clear the Montana Supreme Court takes very seriously claims of constitutional violations such as due process. If that court determined Eklund did not meet his burden under Montana's broader and more protective rules of due process, surely the required "compelling reason" for review under Rule 10 does not exist here. The state law grounds are more than adequate.

II. The Petition is based upon expansive contentions and gross assumptions; it relies on allegations of improper interest by veniremen which are highly speculative and contingent.

The most crucial contingency and assumption, which lies at the very heart of Petitioner's claim, is that the trial testimony proved an impartial jury would have awarded Eklund's requested damages of $1,325,000 – the large sum which would prejudice every juror. In fact, the trial testimony showed actual damages of much less, for example, $100,000 medical damages. At the time of the accident, Petitioner was 65 years old; he was at the end of his working life, not the beginning where economic loss would have been far greater. Million dollar personal injury verdicts are rare, especially in states like Montana. To simply treat a million dollar jury request as a guaranteed award by a jury is nothing more than bold, subjective speculation. To base this Court's review on certiorari upon such speculation is inappropriate.

Petitioner's expansive contentions that evidence of negligence was "overwhelming" also cannot stand as proper basis for this Court to accept review. Such contentions have not been looked upon favorably by this Court even in a case cited by Petitioner. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825-826, 106 S.Ct. 1586, 89 L.Ed.2d 823 (1986). The record reveals the following evidence which the judge, jury, and Montana Supreme Court all considered credible

and substantial enough to support the finding of no liability:

– At 10:55 a.m. Wheatland County personnel had their first knowledge the stolen vehicle appeared to be headed toward Harlowton, this while the officers were returning from a neighboring town to the north (Judith Gap). They had only a short time to respond; they responded based on the request by Golden Valley County personnel to attempt to intercept the vehicle. *Trans.*, pp. 364, 377-378.

– Wheatland County officers responded appropriately based on their training, utilizing lights and siren in an attempt to persuade the driver of the stolen vehicle to pull over and stop. *Trans.*, pp. 298, 378, and 789.

– Any road block that is utilized must provide for an escape route, and officers are trained not to completely block the road. *Trans.*, pp. 339, 382, 435, 763, and 799-800. Here, the evidence was clear the juveniles who stole the vehicle would not stop for such a road block, and would have had a way to bypass such a road block. *Trans.*, pp. 381, 436, and 800.

– The duration of time from the first observation of the stolen vehicle to the time of the crash was only about four minutes. *Trans.*, pp. 380-381. There simply was insufficient time to establish a road block or utilize stop-sticks. In any event, Wheatland County did not have stop-sticks. *Trans.*, pp. 296, 363, 444, and 764. Even had stop-sticks been utilized they

would not have stopped the vehicle; there was extensive testimony motor vehicles can go for extended distances with deflated tires even after stop-sticks have been utilized. *Trans.*, pp. 446-447, 765.

– Under Montana law, law enforcement personnel can exceed the speed limit. [*Section 61-8-107, MCA.*] In this case the officers backed off once they entered the town. *Trans.*, pp. 321, 343, 353, 369, 763, 784, and 800.

– One of the witnesses who pulled off to the side of the road after seeing the stolen vehicle close behind her, testified she did not believe the officers were traveling at an excessive rate of speed when they went by her, although the stolen vehicle was traveling at an excessive rate of speed. *Trans.*, p. 542.

– There was testimony that, even within the short period of time, there was communication between the officers in pursuit and the Dispatch Officer. *Trans.*, p. 334.

– There was testimony Undersheriff Christensen followed law enforcement policies as he had been trained. *Trans.*, pp. 378-379. His passenger, then-veteran Montana Highway Patrolman James Rosenberg, stated proper procedures were followed as he reflected in his training as a highway patrolman. *Trans.*, p. 793.

Such clear credible evidence could certainly lead an impartial jury to find no negligence on the part of these law enforcement officers who first sighted the

stolen vehicle four minutes and approximately three miles before the accident. Petitioner's contention that evidence of negligence was "overwhelming" is unwarranted and improperly expansive. To accept certiorari review on such grounds would not be proper under Rule 10.

Petitioner's "possible temptation" pecuniary test for prospective jurors also cannot be considered valid unless this Court makes broad assumptions such as: all taxpayer veniremen know the precise number of mills a municipality levies on all of their real property, and taxpayers can easily calculate in their heads the effect of any possible jury award on their tax bill. Such assumptions are insupportable. A property tax classification system is arcane and complex; in Montana, the Legislature has established 16 different classifications, many with numerous subclassifications. *See Title 16, Chapter 6, Montana Code Annotated*. It is not reasonable to assume veniremen would be able to make such calculations; even if they were, how would this Court determine which jurors could stay and which could be removed in a constitutionally acceptable manner.

Another crucial assumption would have to be that taxpayers/veniremen come to court solely by concern for their property tax bill. This Court would have to assume taxpayers cannot be trusted to be impartial, to consider the admitted evidence, to follow the instructions of the trial judge, and then reach a proper verdict. To accept Rule 10 review based upon such assumptions would not be rational or proper.

To impute bias to taxpayer veniremen requires further speculation. The Montana Department of Revenue was in the process of a well-publicized 10-year reappraisal of all real property in the state at the time of this trial. It was well known some values would go up and some down. What effect might that have had on the panel in light of a "possible temptation" rule? There is no end to questions like these if the Petitioner's test of "possible temptation" were reviewed by this Court.

III. The Montana Supreme Court correctly applied well-settled law in its finding the trial court did not abuse its discretion in the matter of jury selection.

The underlying cause of action here is based upon a motor vehicle accident which occurred in Wheatland County. The named defendants are Wheatland County and the Wheatland County Sheriff. Under clear Montana law, Wheatland County is the proper venue. *Sections 25-2-125, 126, MCA.*

Montana statutory law also includes a provision for challenges to jurors for cause in *Section 25-7-223, MCA*:

> **Challenges to jurors for cause.** Challenges for cause may be taken on one or more of the following grounds: . . . (5) interest on the part of the juror in the event of the action or in the main question involved in the action, except the juror's interest as a member or citizen of a municipal corporation; . . . .

Petitioner Eklund does not argue these statutes are unconstitutional on their face. Rather he claims they were misapplied by the trial court and affirmed by the Montana Supreme Court. There is no doubt due process requires a fair trial by a fair tribunal. But since Petitioner does not seek to have taxpayer status declared a disqualifying interest in matters such as these, the entire alleged violation depends upon uprooting and overturning two long-held principles regarding jury trials. One is the clear discretion of a legislative body with respect to challenges or qualifications of jury, or the mode of jury selection. See *United States v. Wood*, 299 U.S. 123, 146, 57 S.Ct. 177, 81 L.Ed.2d 78 (1986). The other is the clear discretion accorded to the trial judge. See *Mu'min v. Virginia*, 501 U.S. 1269, 112 S.Ct. 13, 115 L.Ed.2d 1097 (1991). To raise to a constitutional level such "second-guessing" of a legislative body or trial judge, especially in matters relating to the results of *voir dire*, is not appropriate.

This Court has said an impartial jury consists of jurors who will conscientiously apply the law and find the facts. The party who seeks to exclude a juror due to bias must demonstrate lack of impartiality through questioning. The trial judge's duty is to determine whether the challenge is proper: " . . . did the juror swear that he could set aside any opinion he might hold and decide the case on the evidence, and should the juror's protestations of impartiality have been believed." This Court went on to state deference must

be paid to the trial judge who sees and hears the juror. *Wainwright v. Witt*, 469 U.S. 412, 422-423, 105 S.Ct 844, 83 L.Ed.2d 841 (1985).

Very recently this Court again looked to *Wainwright* when it addressed an issue of jury impartiality:

> The judgment as to whether a venireman is biased . . . is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations are entitled to deference even on direct review.
>
> * * *
>
> Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. (cite omitted)

Uttecht v. Brown, 551 U.S. 1, 127 S.Ct. 2218, 2223, 167 L.Ed.2d 1014 (2007).

This rule of law was properly applied by the Montana Supreme Court when it recognized the trial judge stood in the best position to detect whether a challenged juror demonstrated bias. *Eklund v. Wheatland County*, 2009 MT 231, ¶ 42, 351 Mont. 370, 212 P.3d 297 (2009).

The *voir dire* examination by counsel for both parties was not perfunctory. It was extensive, and the judge was very attuned to possible prejudices. Counsel for Eklund and the County vigorously questioned the panel and elicited clear answers. The court excused jurors based upon concerns for impartiality, for actual bias. *Trans.*, pp. 58-59, 60-65, 67-69, 78-99, 100-117.

The Montana Supreme Court also correctly declined to impute bias based upon taxpayer status. As the Petitioner pointed out, this Court has recognized that: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood, supra*, 299 U.S. 123, 145-146. However, to impute bias based upon taxpayer status, is exactly such an artificial formula. Here, again, is the reason to accord deference to the trial judge in these matters – who better to determine the "state of mind" of the venire?

To impute bias – to deny a municipal taxpayer can be "appropriately indifferent" – also flies in the face of three recent damage awards by local juries in Montana: *See Massee v. Thompson*, 2004 MT 121, 321 Mont. 210, 90 P.3d 394; *Haman v. Maco Insurance Co.*, 2004 MT 44, 320 Mont. 108, 86 P.3d 34; *Chambers v. City of Helena*, 2002 MT 142, 310 Mont. 241, 49 P.3d 587, overruled on other grounds,

Giambra v. Kelsey, 2007 MT 158, 338 Mont. 19, 162 P.3d 134.

If this Court were to accept Petitioner's argument of imputed bias, it would create just the sort of "particular test" that is clearly not specified in the Constitution. It would make constitutional a circumstance much better left in the hands of trial courts who have long experience seeking impartial juries under established rules and procedures.

IV. The Petition rests in large part upon unwarranted allegations of factual error by the jury because it did not find the County negligent; such error, if any, is not appropriate for review under Rule 10.

Petitioner posits much of his argument on the notion an impartial jury would have found liability and simply awarded his requested damages. Such factually based arguments are not appropriate grounds to grant certiorari.

Petitioner misstates the facts and law in dramatic one-sided fashion regarding the "hot pursuit" and "overwhelming evidence of negligence." The Montana Supreme Court recites a more balanced view of the testimony relating to the chase which certainly shows a finding of liability would not be required by any reasonable jury. *Eklund, supra*, 2009 MT 231, at ¶¶ 45-46. The "overwhelming evidence of negligence" is based upon opinion evidence elicited from Eklund's expert on high-speed chases. Juries are entitled to

ignore testimony they do not find credible or persuasive. It is not for this Court to declare unconstitutional the fact a jury finds certain expert testimony unpersuasive.

V. The Montana Supreme Court did not decide an important question of federal law that has not been, but should be, settled by this Court; nor has it decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner argues the Montana Supreme Court has somehow decided an important federal question in a way that conflicts with relevant federal law or decisions of this Court. Such a position is untenable because this Court has properly not ruled every taxpayer has an imputed bias when called as a venire in cases such as these. The decision below is certainly not in conflict.

Petitioner also argues this Court *should* settle the question that every taxpayer, when called for jury duty in a case such as this, has an imputed bias. He bases this request on the notion the same rules which apply to judges regarding tests for disqualification and impartiality must also apply to jurors. He states where there is "possible temptation" for unfairness because of a perceived pecuniary interest, a juror must be excused. There are numerous reasons such a ruling is not an appropriate basis for Rule 10 jurisdiction.

Common sense dictates that rules which govern the actions of a single individual adjudicator are not properly applicable to a jury of 12 citizen adjudicators whose actions are overseen by a judge. A jury does not, and cannot, act unilaterally. The due process stakes are clearly much higher when the one person who is going to decide a party's fate has a direct and substantial financial interest in the outcome. Juries by their very nature operate on a group dynamic with all the complications, pitfalls and advantages such a process entails. Impartiality in such circumstances, the state of mind of the group as it deliberates, is far more complex than for a single judge; the rules simply cannot suddenly be made analogous on *constitutional* grounds.

Petitioner's idea of a "possible temptation" test is not constitutionally sound because of the profound public policy and practical implications of imputing bias to taxpayers. Is this Court going to contrive a formula for when "possible temptation" exists? Can large landowners serve on juries if the requested damages are $500,000 but not on juries where the requested damages are two million dollars? Can small landowners serve on all juries, but large landowners only on those where the damage request is a certain amount?[4] Will the clerks of the trial

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[4] This Court, decades ago, properly invalidated ownership of real property as an acceptable test for entitlement to rights and privileges by all citizens. The sort of classification which would logically arise from differentiating between veniremen on

(Continued on following page)

courts have to maintain a current list of the appraised value of each prospective juror's property? Will that list become a part of the trial record? Will citizens who are part of a corporation or partnership that owns land be required to inform the clerk as to what exact portion of the real property tax liability they owe under the specific terms of that entity's corporate documents? Will a "possible temptation" test which relies on imputed bias of prospective taxpayer/jurors likely lead to a demand for change of venue in every case where a municipality is sued? Such a rule would create great strain on judicial resources. Would parties engage in "jury-shopping" seeking trial in jurisdictions depending on appraised value of real property? There is no end to the mischief such a rule, made constitutional, might produce.

The issue of jury impartiality does not need this Court to review on certiorari the Petition before it. Established law adequately addresses the standards and procedures for ensuring a constitutionally required fair tribunal including, but not limited to: 1) an attentive, diligent trial judge presiding over rigorous *voir dire* examination who then exercises discretion in removing challenged panel members, 2) availability of peremptory challenges, and 3) proper admonition by the judge throughout trial regarding proper consideration of evidence and law. No ruling of

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the basis of how much property each individual owns, sets up grounds for an equal protection challenge.

this Court is required to address further the requirements for a fair trial by a fair tribunal as requested in the Petition.

VI. The Montana Supreme Court correctly decided the case on the merits.

The Montana Supreme Court carefully reviewed the merits of the Petitioner's claims. As set forth above, it correctly decided the case on the merits. There is no compelling reason for this Court to review the findings and determinations of the Montana Supreme Court in this matter.

CONCLUSION

Certiorari is not warranted. Because there is no ground for plenary review, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

NORMAN H. GROSFIELD
DEE ANN G. COONEY
GROSFIELD LAW FIRM
44 North Last Chance Gulch, Ste. 5
P. O. Box 5015
Helena, MT 59604-5015
Telephone: 406.443.7295

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No. 09-426

In the
Supreme Court of the United States

DONALD S. EKLUND,

Petitioner,

v.

WHEATLAND COUNTY, AND ITS SHERIFF,
JAMES ROSENBERG,

Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the State of Montana

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas E. Towe
Counsel of Record
For Petitioner
2525 6th Avenue North
PO Box 30457
Billings, MT 59107
(406) 248-7337

QUESTIONS PRESENTED

Whether the Plaintiff was denied due process of law when he was forced to accept a jury in his personal injury law suit all of whom were taxpayers of the Defendant county and who feared they personally would be required to participate in the payment of a very large verdict against the county. Due process is denied if either the Judge or the Jury have a significant financial interest in the outcome. *Aetna Life Insurance Company v. LaVoie*, 475 US 813, 824 (1986). Here the average juror's share was $1,241.63 and the jury foreman's share was $7,334.42 out of his own pocket.

PARTIES

The Petition is Donald S. Eklund.

The Respondents are Wheatland County and its Sheriff, James Rosenberg.

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United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. 9, 13

REPLY BRIEF OF PETITIONER

Petitioner,(hereinafter "Eklund"), respectfully submits the Respondent's Brief (hereinafter "Opposition Brief") presents a number of new arguments none of which are relevant to the serious questions posed to this Court in the Petition.

POINTS AND AUTHORITIES

I.

Wheatland County has Not Answered the Serious Constitutional Violations Raised in the Petition.

In his Petition for Writ of Certiorari, Eklund pointed out that the jurors who sat on his civil case had a personal pecuniary interest in the outcome of the lawsuit. As taxpayers of a county with only 2010 people, Eklund's claim of $1,375,000 would have an enormous impact on each juror if the County had to pay the whole amount out of their general fund.

Eklund pointed out that each juror would have to pay between $63.83 and $7,334.42 if Plaintiff were successful. This is an average of $1,241.63 for each juror who sat on this jury. The jury foreman was the largest taxpayer with a potential liability of $7,334.42. Petitioner suggested that such large

numbers constitute a "possible temptation" to the average juror that prevents the juror from holding a balance nice, clear and true that a is required of an impartial jury. Eklund contends that a juror cannot be permitted to sit on a case where he or she has such a large interest in the outcome. *In re: Murchison*, 349 US 133, 136 (1955); *Aetna Life Insurance Co. v. LaVoie*, 475 US 813, 822 (1986); *Ward v. Village of Monroeville*, 409 US 57, 60 (1972).

Petitioner urged that the law is well-settled as it relates to Judges and that there is no reason why it should not also apply equally to jurors. *In re: Murchison*, 349 US 133, 136 (1955); *Turner v. Louisiana*, 179 US 466, 472 (1965); *Irvin v. Dowd*, 366 US 717, 721-722 (1961); *Thiel v. Southern Pac. Co.*, 328 US 217, 219 (1946). (See Eklund's Petition for Writ of Certiorari at 13-22.)

Respondents, (hereinafter "Wheatland County") fail to even address these serious constitutional questions. With one exception (see Argument II herein) they do not even truly disagree with Eklund's arguments. With this exception, Wheatland County avoids the real issues of this case by superficial arguments that do not reach the central point of Eklund's Petition.

A. That Montana has a Good Constitution is Irrelevant.

For example, in Argument I, Wheatland

County argues the Montana Constitution protects individual rights more broadly than the Federal Constitution and that the Montana Supreme Court has breathed life into these rights. What the Montana Constitution and the Montana Supreme Court has done with regard to other rights, such as the right to know, the right to privacy, and the right to individual dignity, is irrelevant to the due process question that Petitioner has raised of whether Petitioner has a right to an unbiased jury to decide the facts.

B. That the Damages are Speculative is Irrelevant.

Further, in Argument II, Wheatland County argues that the claim for $1,325,000.00 [sic. it is $1,375,000] in damages is speculative. Wheatland County then attempts to review the facts to show why it thinks this amount is speculative. What Wheatland County doesn't say is that Wheatland County made virtually no defense to the amount of damages claimed by Eklund. Their cross-examination of the many medical doctors and other persons who testified as to these damages was minimal if not non-existent. The point Eklund wishes to make is that the case for damages was so strong that it would be hard to argue realistically for a lesser amount once liability was established.

More importantly, however, a review of the facts of the case and the issue of whether Eklund's

claim was speculative or not is irrelevant to constitutional issue of whether the jurors were biased.

C. The Strength or Weakness of Eklund's Case on the Facts is Irrelevant.

Wheatland County tries to minimize the overwhelming evidence of liability. What one witness said does not overcome the virtual admission of liability on the part of the sheriff officers for Wheatland County who admitted driving 75 mph in the middle of a small town, which they themselves acknowledged was "way to fast." (See the facts regarding the Sheriff's hot pursuit in Eklund's Petition at 6-9.)

Stating that the jurors are entitled to disregard experts does not diminish the overwhelming evidence of Eklund's expert witness on hot pursuits, Richard Dague, who called on his many years of experience as a police officer, an Assistant Police Chief, a trainer, and chief instructor. He testified that the actions of Wheatland County personnel essentially constituted a comedy of errors in that the sheriff officers failed to follow their own training, failed to follow their own written policies, and failed to avoid risks to other persons and property when they had an ample opportunity to do so. (See Eklund's argument regarding the over-

whelming evidence of negligence in his Petition at 9-10.)

Hot pursuits are truly a serious concern for law enforcement abuse - between 25% and 50% of all law enforcement officers are killed in the line of duty involving vehicles, often during hot pursuits.

Nevertheless, whether the facts supporting liability were strong or weak is totally irrelevant to the issue of whether the jurors were biased. The well settled law is that the decider of the facts cannot be subject to a possible temptation as these jurors were subjected.

D. The Complexity of the Property Tax System is Irrelevant.

Wheatland County argues that the reappraisal system for property taxes in Montana is fair and is too complicated for the average person to really understand. (Brief in Opposition at 14.)

Regardless of how complex the computations and figures may be, it can be assumed the average taxpayer who actually writes out a check for their property taxes every year understands, in general, the impact on their own taxes of increased spending by its local government. Even if some jurors may have been confused, it must be assumed that in the

privacy of the jury deliberations, someone would explain the full impact of a $1,375,000.00 charge against Wheatland County.

To argue, as Wheatland County does, that taxpayers can be trusted to be impartial even when they personally face a possible personal increase in their own taxes of $7,335.42 or $4,769.15 (an average of $1,241.63 for each of the twelve jurors) is not realistic. (Opposition Brief at 14-15.) That is precisely the "possible temptation" that this Court has referred that would prevent a person judging the facts from holding the balance nice, clear and true.

Even every juror could set aside such an overwhelming temptation (we suggest they clearly could not), there is still an appearance of bias that can never be overcome. The citizens of this country will simply not accept the notion that a person who must himself or herself pay over a $1,000.00 to fund a verdict is not biased. To argue to the contrary is simply not realistic.

E. Giving Deference to the Trial Judge who Merely Followed the Legislative Mandate in Voir Dire is Irrelevant and Meaningless.

Further, Wheatland Count argues that the provisions for challenging jurors exists and we should not second guess the Trial Judge who followed those

provisions nor the Legislature which specifically mandated that a taxpaying juror cannot be dismissed for cause. (Opposition Brief at 15-16.) Wheatland County argues that deference must be given to the

Trial Judge and since *voir dire* was extensive in this case, this Court must assume Eklund was treated fairly.

Again, this does not address the serious constitutional question of whether a juror with not only a possible temptation, but an almost certain temptation can properly decide the facts of a civil case. In fact, not everyone agreed that the *voir dire* procedure was proper and constitutional. (See *Eklund v. Wheatland County*, Cotter, J., dissenting, App. 16-22.)

Even the most thorough *voir dire* cannot cure the bias in this case. The Montana legislature has mandated that being a taxpayer of the Defendant is not grounds for a challenge for cause. §25-7-223(5), MCA. Thus, when the Trial Judge insists on following that legislative mandate regardless of the consequences error is committed. Giving deference to the Trial Judge (Opposition Brief at 16-17) does not cure the constitutional error.

F. The Citation of Other Cases in Which the Jury has Returned a Small

Verdict for the Plaintiff is Irrelevant.

The citation of cases in which jurors have awarded damages against their own local government does not solve the problem. (See Opposition Brief at 18-19.) That too is irrelevant. Whether or not bias existed in other cases does not answer the question of bias in this case.

The three cases cited by Wheatland County (Opposition Brief at 18-19) do not support Wheatland County's argument. For example, *Haman v. MACO Insurance Co.*, 2004 MT 44, 320 Mont. 108, 86 P.3d 34 (2004), does not involve a municipal Defendant. Further, the jury verdict was reduced to $43,000.00, a far cry from the $1,375,000 involved here. (*Id.* at ¶5, 320 Mont. at 109, 86 P.3d at 34.) More importantly, Cascade County which has a population of 82,026.00 is hardly comparable to Wheatland County's 2,010.[1]

In *Chambers v. City of Helena*, 2002 MT 142, 310 Mont. 241, 49 P.3d 587 (2002), the jury brought back a verdict in favor of the municipality and awarded no damages. (*Id.* at ¶47, 310 Mont. 257, 49 P.3d at 596.)

Finally, in *Massee v. Thompson*, 2004 MT 121, 321 Mont. 210, 90 P.3d 394 (2004), the jury verdict

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[1] Numbers from U S. Census Bureau, State and County Quick Facts (estimates based on 2008 data.

was $358,000.00 in a municipality (Broadwater County) over twice the size of Wheatland County at 4,704.[2] (*Id.* at ¶1, 321 Mont. at 213 90 P.3d at 396.)

G. That the Montana Supreme Court Carefully Reviewed the Merits is Irrelevant.

Finally, Wheatland County contends that the Montana Supreme Court carefully reviewed the merits of Petitioner's claim and correctly decided the case on the merits. (Opposition Brief at 23.)

Whether or not the Montana Supreme Court found the case correctly decided on the merits is irrelevant. The question is whether or not Eklund had a fair trial in the first instance by jurors who were impartial. On this point, it is clear he did not. By denying him a fair and impartial jury, a violation of the 14th Amendment took place and he is entitled to relief from this Court. *Tumey v. Ohio,* 273 US 510. 523 (1927).

While this Court has not extended the right to jury trial in civil cases as an element of due process applicable to state courts through the 14th Amendment (*Minneapolis and St. Louis Railroad Company v. Bombolis*, 241 US 211, 217 (1916), it is

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[2]U.S. Census Bureau, State and County Quick Facts (estimates based on 2008 data.

an open question. See, *Curtis v. Loether*, 415 US 189, 192 n.6 (Justice Marshall, J., writing for the Court). However, this is not the issue in the instant case. The issue in the instant case is whether an American citizen is entitled to a court to try his case by persons who do not have an interest in the outcome. *In re: Murchison*, 349 US 133, 136 (1955); *Aetna Life Insurance Co. v. LaVoie*, 475 US 813, 822 (1986); *Tumey v. Ohio*, 273 US 510, 523 (1927); *Ward v. Village of Monroeville*, 409 US 58, 60 (1972).

II.

The Possible Temptation Test is just as Sound When Applied to a Jury as to a Judge.

Wheatland County claims common sense dictates rules which govern the action of a Judge are not properly applicable to a jury of twelve citizens, and that the "possible temptation" test is not constitutionally sound as applied to a jury. (Brief in Opposition at 21.)

The cases cited by Eklund, however, deal with judges and mayors charged with deciding the facts (Petition at 16-20) just as jurors are charged with deciding the facts. There can not be any real difference between a judge or mayor charged with deciding the facts and a juror of 12 citizens deciding the facts; they are both subject to the same possible

temptation when they each have a pecuniary interest in the outcome. As this Court stated in *In re: Murchison,* 349 US 133, 136 (1955), "a fair trial in a fair tribunal is a basic requirement of due process." A jury is as much a part of this fair tribunal as is the judge. *Id.*

Further, the fact that there is more than one person involved in a jury does not solve the problem. The bias of any one juror taints the whole jury; under our system of jurisprudence not one single jury can be biased or the Plaintiff is denied due process of law. See *Reynolds v. United States,* 98 US 145, 154-56 (1878); *Irvin v. Dowd*, 366 US 717, 721-722 (1961).

III.

It is not Difficult to Fashion a Workable Test for Possible Temptation. A Precise Test is Unnecessary.

Wheatland County contends that this Court has never ruled that every taxpayer has an imputed bias and can never serve on a jury in which his municipality is a Defendant. (Opposition Brief at 20.) Eklund does not contend that this Court should go that far. Although such a position would be reasonable, it is not necessary for the decision in this case to make universal rule that no taxpayer can ever serve on a jury involving his or her municipality.

In many instances, the impact on an ordinary taxpayer is so small that there maybe an issue of de minimis. It is simply not necessary in this case to decide that issue. Here we have a request for $1,375,000.00 to be spread among a population base of only 2,010 people in which every single juror would be assessed some money (from $63.83 to $7,334.42 with an average of $1,241.63) if the Plaintiff's claim is sustained. The sum of $7,334.42 is not de minimis. It is not minimal. Mr. Lammars cannot serve on this jury. Whether the same applies to a lesser amount is not necessary to decide in this case.

Wheatland County also claims it would be difficult to administer a "possible temptation" test to determine when a juror can serve and when a juror cannot serve. Wheatland County contends that the public policy and practical implications of imputing bias to taxpayers cannot be expressed in a precise formula. (Opposition Brief at 21.)

Eklund insists that no such precise test is necessary. This Court can overlook a temptation which is truly de minimis or minimal if it chooses. That issue, however, is not presented in the instant case. The solid hard damage request by Eklund in the instant case is $1,375,000.00 to be distributed among 2,010 people. The foreman of the jury, if the total amount were awarded, would be assessed $7,334.42. That is not de minimus. That is not minimal.

For the decision in this case, this Court need not be any more precise than this. This Court often leaves the precise level or measurement for determining a constitutional violation up to future litigation. This issue is certainly no different.

CONCLUSION

The right to be tried, even in a civil case, by a forum where the Judge or triers of fact do not have an interest in the outcome is a fundamental right guaranteed by the due process clause of the 5th Amendment and is applied to the states under the 14th Amendment. As to Judges, the law is well-settled. There is no reason why the same reasoning should not be applied to jurors who also make decisions regarding the facts.

In this case, jurors were faced with the possibility, as taxpayers of Wheatland County, of paying between $63.83 and $7,334.42 if Wheatland County was required to pay the amount requested by Eklund. The average juror would have to pay $1,241.63 as his or her share of the jury verdict. This raises more than a mere possible temptation. It clearly suggests a presumption of bias that must be applied to meet the constitutional requirements of a fair trial.

Nowhere does Wheatland County address these serious constitutional issues. Nowhere does Wheatland County challenge the numbers that each

juror would have to pay as his share of the verdict if Wheatland County were indeed required to pay the judgment. None of the serious issues raised by the Petition are addressed by Wheatland County.

Instead, they suggest deference should be given to the Trial Judge in her rulings regarding the *voir dire*, deference should be given to the Legislature in providing that being a taxpayer of the Defendant is not grounds for dismissal of the juror for cause, and deference should be given to the Montana Supreme Court because it carefully reviewed the decision on the merits.

These arguments simply don't cut it; nor do the arguments that Montana has a good Constitution and in other areas it does a good job of protecting individual rights. Every single argument made by Wheatland County is weak at its best and totally irrelevant at its worst. They have simply failed to grapple with the real issues raised by the Petition.

WHEREFORE, it is respectfully submitted Eklund's Petition for Writ of Certiorari should be granted.

DATED this ____ th day of January, 2010.

Thomas E. Towe
Towe, Ball, Enright, Mackey
Sommerfeld, PLLP
2525 Sixth Avenue North
PO Box 30457
Billings, MT 59107-0457
406-248-7337
Counsel of Record for
Petitioner